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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 478

MARK GRAVES, JOHN J. MERRILL AND JOHN P.
HENNESSY, AS COMMISSIONERS CONSTITUTING
THE STATE TAX COMMISSION OF THE STATE
OF NEW YORK, PETITIONERS,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, UPON
THE RELATION OF JAMES B. O'KEEFE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF
NEW YORK

PETITION FOR CERTIORARI FILED NOVEMBER 18, 1938.

CERTIORARI GRANTED DECEMBER 19, 1938.

5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No.

4

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HENNESSY, AS COMMISSIONERS CONSTITUT-
ING THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK, PETITIONERS,

vs.

THE PEOPLE OF THE STATE OF NEW YORK
UPON THE RELATION OF JAMES B. O'KEEFE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW YORK

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[fol. a]

IN COURT OF APPEALS OF NEW YORK

THE PEOPLE, etc., ex Rel. JAMES B. O'KEEFE, Respondents,
ag't.

MARK GRAVES & ORS., &c., STATE TAX COMMISSION OF THE
STATE OF NEW YORK, Appellants

REMITTITUR—July 7, 1938

Be it Remembered, That on the 10th day of May, in the year of our Lord one thousand nine hundred and thirty-eight, Mark Graves and others &c.—State Tax Commission of the State of New York, the appellants in this cause, came here unto the Court of Appeals, by John J. Bennett, Jr., Attorney General, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And James B. O'Keefe, the respondent in said cause, afterwards appeared in said Court of Appeals by Daniel McNamara, Jr., his attorney.

[fol. b] Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Henry Epstein, of counsel for the appellants, and by Mr. Daniel McNamara, Jr. of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs on the authority of *People ex rel. Rogers v. Graves*, (299 U. S. 401).

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs on the authority of *People ex rel. Rogers v. Graves* (299 U. S. 401), as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the

State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Clerks' certificates to foregoing paper omitted in printing.

[fol. c] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY
THE PEOPLE OF THE STATE OF NEW YORK upon the Relation
of JAMES B. O'KEEFE, Relator,
against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY,
as Commissioners Constituting the State Tax Commission
of the State of New York, Respondents

JUDGMENT OF AFFIRMANCE—Filed August 19, 1938

The above named respondents having appealed to the Court of Appeals from the final order of the Appellate Division of the Supreme Court, Third Judicial Department, entered herein in the office of the Clerk of Albany County on the 17th day of January, 1938, annulling the final determination of the respondents denying the application of the relator for a revision and resettlement of the computation of his personal income tax for the calendar year 1934, and for a refund of the sum of \$57.28, the said personal income tax paid by the relator for the calendar year 1934, and in all respects granting the said application and directing that the respondents refund to the relator the sum of \$57.28, the said personal income tax paid by the relator for the calendar year 1934, and that the relator recover of the respondents the sum of \$50.00 costs and his disbursements of this proceeding, and that the relator have execution therefor, and the Court of Appeals having heard the said appeal and ordered and adjudged that the final order, so appealed from, be affirmed, with costs, and further ordered that the remittitur from the said court be remitted to this court, [fol. d] to be proceeded upon and enforced according to

law, and the remittitur from the Court of Appeals having been duly filed in the office of the Clerk of Albany County, and an order having been entered thereon by this court on the 5th day of August, 1938, making the said order and judgment of the Court of Appeals the order and judgment of this court and directing that the final order entered herein on the 17th day of January, 1938, be affirmed, with costs, and that a judgment of this court be entered herein affirming said final order, with costs of said appeal to be taxed against the respondents, and the said order having been duly filed in the office of the Clerk of Albany County on the 5th day of August, 1938,

Now, on Motion of Daniel McNamara, Jr., attorney for the relator, it is hereby

Adjudged that the final order in this proceeding, entered herein on the 17th day of January, 1938, be and the same hereby is affirmed, and that the relator, James B. O'Keefe, recover of the respondents, Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, the sum of \$257.08, the amount of his costs herein as taxed, and that the relator, James B. O'Keefe, have execution therefor.

Dated: August 19, 1938.

John A. Knox, Clerk.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 1] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation
of James B. O'Keefe, Relator,
against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY,
as Commissioners Constituting the State Tax Commission of the State of New York, Respondents

STATEMENT UNDER RULE 234

This proceeding was commenced on April 17th, 1936, by the service upon respondents of a notice of motion dated April 15th, 1936, for an order directing the issuance of a writ of certiorari. The order was entered upon consent on April 18th, 1936. The writ of certiorari was allowed on April 18th, 1936, and issued on April 20th, 1936.

The writ of certiorari was served upon respondents on April 23rd, 1936. Respondents filed their return to the writ in the office of the Clerk of Albany County on May 7th, 1936.

Relator appeared by Bogart, Calise & Di Prima, Esqs. Respondents appeared by John J. Bennett, Jr., Esq., Attorney General of the State of New York. There has been no change of attorneys or parties herein.

[fol. 2] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY
ORDER GRANTING WRIT OF CERTIORARI—April 18, 1936

On reading and filing the petition of James B. O'Keefe, verified on April 7, 1936; the notice of motion herein; proof of service of said petition and notice of motion upon the State Tax Commission and a stipulation signed by said Tax Commission by Mark Graves, president, and by the attorney for said Tax Commission, waiving the filing of an undertaking for costs and charges which may accrue against relator in the prosecution of this writ and it appearing that John J. Bennett, Jr., Attorney General of the State of New York and attorney for the State Tax Commission, has duly consented to the granting of a writ of certiorari as prayed for in said petition;

Now, on motion of Bogart, Calise & Di Prima, the attorneys for petitioner, it is

Ordered, that a writ of certiorari be issued out of and under the seal of this Court as prayed for in said petition directed to Mark Graves, John P. Hennessey and John J. Merrill, constituting the State Tax Commission of the State of New York, returnable at the office of the clerk of the Supreme Court, in and for the County of Albany, within twenty days after the service thereof, to review the taxation [fol. 3] set forth in the petition herein.

Enter.

Francis Bergan, J. S. C.

Consent is hereby given to the entry of the within order granting a writ of certiorari.

Dated, New York, April 17th, 1936.

John J. Bennett, Jr., Attorney General of the State
of New York, Attorney for State Tax Commission.
Bogart, Calise & Di Prima, Attorneys for Petitioner.

IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

WRIT OF CERTIORARI

Whereas, we have been informed by the petition of James B. O'Keefe, verified on April 7, 1936, that theretofore said petitioner James B. O'Keefe had made a claim for refund of the income tax in the sum of \$57.28 which had been paid by him for the year 1934 and that thereafter, on March 26, 1936, said Commission made its determination denying said application, and

Whereas, it is alleged by the petitioner that in refusing said application for a refund, injustice has been done to [fol. 4] the said petitioner James B. O'Keefe herein and that said tax so paid and not refunded as aforesaid, was erroneous and illegal and we being willing to be certified of your proceedings in the premises as such Tax Commission in imposing and exacting such tax, and in failing to grant such application for the refund of the same, and in all things relating thereto do command you to certify and return to the office of the County Clerk of the County of Albany, within twenty days after service of this writ upon you, all and singular the accounts and all the evidence before you upon the application for revision, and readjustment and refund of said tax, and all and singular your proceedings, decisions and actions in the premises, with the dates thereof, and all the accounts, affidavits and all the evidence submitted to you or which were before you in, of or concerning the said matter or matters of the said account for taxes aforesaid against said James B. O'Keefe to the end that said account or accounts, revision, readjustment or refund thereof, and your decision or decisions thereon, may be revised and corrected by this court according to law.

Witness, Honorable Francis Bergan, Justice of the Supreme Court, at the County Courthouse in the City of Albany, this 20th day of April, 1936.

John A. Knox, Clerk.

The foregoing writ of certiorari allowed this 18th day of April, 1936.

Francis Bergan, Justice.

[fol. 5] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

NOTICE OF MOTION FOR WRIT OF CERTIORARI

SIRS:

Please take notice, that upon the petition of James B. O'Keefe, verified the 7th day of April, 1936, and upon Schedule A, and a stipulation waiving the filing of an undertaking for costs hereto annexed, a motion will be made at a Special Term of this court, to be held at the courthouse in the County of Albany, on the 29th day of April, 1936, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order directing the issuance of a writ of certiorari to review the taxation set forth in the petition herein, and for such other relief as to this Court may seem just and proper.

Dated, New York City, April 15th, 1936.

Yours, etc., Bogart, Calise & Di Prima, Attorneys
for Relator, Office & P. O. Address, 38 Park Row,
Borough of Manhattan, New York City.

To Mark Graves, John J. Merrill and John P. Hennessey,
as Commissioners constituting the State Tax Commission
of the State of New York, Albany, New York.

[fol. 6] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

PETITION OF JAMES B. O'KEEFE FOR WRIT OF CERTIORARI

The petition of James B. O'Keefe, respectfully alleges:

First. The petitioner, at the time herein mentioned, resided in the City of Long Beach, Nassau County, State of New York.

Second. The defendants are the Commissioners constituting the Tax Commission of the State of New York.

Third. For the year 1934, petitioner duly made a personal income tax return, pursuant to the Tax Law of the State of New York, and paid to the Tax Commissioners the sum of Fifty-seven and 28/100 (\$57.28) Dollars as the amount of tax payable under said law.

Fourth. Thereafter and on or about August 16, 1935, petitioner duly made application, pursuant to Section 374 of

the Tax Law, for a refund of the foregoing tax and on March 26, 1936, the Tax Commission made its determination denying his application. A copy of said determination, marked Schedule A, is hereto annexed.

Fifth. Upon information and belief, petitioner alleges that such determination is erroneous inasmuch as the tax paid for the year of 1934 was based on a net income of Two thousand nine hundred eight and 54/100 (\$2908.54) Dollars of which the sum of Two thousand two hundred forty-six and 66/100 (\$2246.66) Dollars was salary earned as an attorney at law in the employ of the Home Owners' Loan Corporation; that said corporation is an instrumentality of [fol. 7] the United States Government engaged in the performance of a governmental function; that such part of petitioner's net income, namely, Two thousand two hundred forty-six and 66/100 (\$2246.00) Dollars, as was earned as an employee of the Home Owners' Loan Corporation is exempt from the New York State Income Tax; that the balance of petitioner's net income, namely, Six hundred sixty-one and 88/100 (\$661.88) Dollars was less than the One thousand (\$1,000.00) Dollars personal exemption to which he is entitled by law; that, as a result of the foregoing, petitioner had no taxable balance in 1934.

Sixth. Annexed hereto is a stipulation signed by the attorneys for the respective parties hereto, and the respondents in person, waiving the filing of an undertaking for costs, as provided by Section 375 of the Tax Law of the State of New York.

Seventh. No previous application for the writ herein sought has been made to any Court or Judge.

Wherefore, petitioner prays that a writ of certiorari issue out of this Court to the defendants as Commissioners constituting the State Tax Commission of the State of New York commanding them to make return to said writ pursuant to law, and that said determination of the State Tax Commission be reviewed and said refund granted and for such other relief as may be proper.

Dated, New York City, April 4th, 1936.

James B. O'Keefe, Petitioner.

(Verified on April 7th, 1936, by James B. O'Keefe, as the Petitioner.)

[fol. 8] SCHEDULE "A", ANNEXED TO PETITION OF JAMES B.
O'KEEFE

STATE OF NEW YORK, THE STATE TAX COMMISSION

In the Matter of Claim for Refund and Application for
Revision of the Personal Income Tax of JAMES B.
O'KEEFE for the Year 1934

Return of income on behalf of the above named taxpayer for the calendar year 1934 having been duly filed at the time when required by statute in accordance with the provisions of Article 16 of the Tax Law, and the tax computed thereon in the amount of \$57.28 having been paid at the time of filing; and thereafter on the 17th day of August, 1935, a claim for refund of the entire amount of tax paid having been duly filed and accepted as an application for revision under Section 374 of the Statute; and the matter having come on for formal hearing before Cortland A. Wilbur, Director, and Roy H. Palmer, First Assistant Director, duly designated under the provisions of Section 171 of the Tax Law to hold formal hearings, and such hearing having been had at the Albany office of the Commission, State Office Building, Albany, on October 14, 1935, which formal hearing was continued before Roy H. Palmer, First Assistant Director, at the New York Office of the Commission, 80 Centre Street, New York City, on February 28th, 1936; and the taxpayer having been represented by Bogart, [fol. 9] Calise & Di Prima, attorneys and counsellors-at-law, 38 Park Row, New York City, Mark A. Bogart, and Eli Phillips of counsel; and the taxpayer through his counsel having presented argument thereon and all questions of law and fact having been duly considered by the Commission, and Hon. Mark Graves, Commissioner, having rendered an Opinion herein, which is annexed hereto and made a part of this determination, it is hereby

Determined: that the computation of the tax contained in the return filed by the taxpayer for the year 1934 was correct and that the tax paid upon the filing of said return as hereinbefore stated was due and owing under the provisions of the law, and does not include any taxes or other charges which should not have been lawfully demanded, and that no payment has been illegally made or exacted thereupon; and

that the taxpayer is not entitled to any further resettlement and revision of said tax.

Dated, Albany, N. Y., March 26, 1936.

The State Tax Commission, (Signed) Mark Graves,
Commissioner. (Signed) John P. Hennessey, Com-
missioner.

[fol. 10] OPINION BY GRAVES, COMMISSIONER, ANNEXED TO
SCHEDULE A

James B. O'Keefe, the taxpayer herein, a resident of the State of New York, duly filed his income tax return for the calendar year 1934 on or before the 15th day of April, 1935, and at the time of filing paid the sum of \$57.28, the entire amount of tax computed to be due on the face of the return.

Included in gross income reported in such return, and at Item 21 thereof, was an amount of \$2,246.66 stated to be compensation paid to the taxpayer by Home Owners' Loan Corporation, 350 Fifth Avenue, New York City. The taxpayer's occupation or trade was stated in the return to be that of attorney-at-law.

Under date of August 17th, 1935, the taxpayer filed with this Department a claim for refund in the amount of \$57.28, the total tax paid. The basis of such claim was that the said sum of \$2,246.66, the salary paid to the taxpayer, as an attorney-at-law, by the Home Owners' Loan Corporation was not taxable, and should not have been included in gross income, and that the elimination thereof would result in no tax being due for the year in question.

The taxpayer's claim that such income is not subject to the New York State Personal Income Tax is based upon his assertion that the Home Owners' Loan Corporation is an instrumentality of the United States Government and that during 1934 he was an employee of the Federal Government, engaged in the performance of a governmental function.

From the testimony taken at a formal hearing before Deputy Commissioner Cortland A. Wilber on October 14th, [fol. 11] 1935, which hearing was continued before Assistant Director Roy H. Palmer on February 28th, 1936, the following facts were brought out; namely, that during the year 1934 the taxpayer was employed as an examining attorney by said Home Owners' Loan Corporation; that he started work on January 12th, 1934 at a compensation of \$80.00

per month; that his duties as examining attorney included the reading of titles, i. e., the examination of certificates sent in by Title Companies before sending the file to the closing attorney to see if there were any defects in title, to examine the certificates of title after the return of the file by the closing attorney prior to the loan closing, and various similar duties; that he received his appointment verbally from one Leo P. Dorsey, State counsel for the Corporation; that he tried no Civil Service examination for the position; that he was paid semi-monthly by check of Home Owners' Loan Corporation signed by P. J. Mahoney, Treasurer of the Home Owners' Loan Corporation, drawn on the Treasury of the United States; that the salary checks were the checks of the Home Owners' Loan Corporation.

The Department has raised no question that the taxpayer was so employed throughout the year 1934 by the Home Owner's Loan Corporation and that he received a salary as reported from such Corporation. The sole question is, was this salary exempt from taxation?

Section 359, paragraph 2-f of Article 16 of the Tax Law, excludes from gross income:

"Salaries, wages and other compensation received from [fol. 12] the United States of officials or employees thereof, including persons in the military or naval forces of the United States."

The Law creating the Home Owners' Loan Corporation as amended is entitled "Home Owners' Loan Act of 1933". It provides in Section 4-(a) thereof that the Federal Home Loan Bank Board (created by Congress under the Federal Home Loan Bank Act) was:

"Authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation which shall be an instrumentality of the United States, which shall have authority to sue and be sued in any Court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such by-laws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the Board of Directors of the Corporation and shall serve as such directors without additional compensation."

The Act further provides that the Federal Home Loan Bank Board shall determine the minimum amount of capital stock of the corporation which may not exceed an aggregate of \$200,000,000. It also provides that such stock shall be subscribed for by the Secretary of the Treasury on behalf of the United States, and the Reconstruction Finance Corporation was authorized to make available to the Secretary of the Treasury the sum of \$200,000,000. for such purpose. [fol. 13] The Home Owners' Loan Corporation was also empowered to issue bonds in an aggregate amount not to exceed \$4,750,000,000. to be sold by the corporation to obtain funds for carrying out the purposes of the Section which bonds were to be fully and unconditionally guaranteed both as to principal and interest by the United States.

Among the other purposes for which the corporation was organized were the following:

(a) For a period of three years after the date of the enactment of the Act

(1) To acquire in exchange for bonds issued by it, home mortgages and other obligations and liens secured by real estate recorded or filed or executed prior to the date of the enactment of the law and

(2) In connection with any such exchange to make advances in cash to pay the taxes and assessments on the real estate, to provide for necessary maintenance and make necessary repairs, to meet the incidental expenses of the transaction and

(b) For a period of three years from the date of the enactment of the Act to make loans in cash in cases where property is not otherwise encumbered, but in no case should such loan exceed fifty per centum of the value of the property securing the same; such loan to be secured by duly recorded home mortgage bearing interest and

(c) In a case where the holder of a home mortgage or other obligation or lien eligible for exchange for the corporation bonds does not accept such bonds in exchange, to make cash advances to such home owner in an amount not [fol. 14] to exceed forty per centum of the value of the property.

Various limitations and rules for the making of such loans as are indicated above are also included in the Act. The pe-

itioner at the formal hearing introduced in evidence excerpts from the Manual of Rules and Regulations of the Home Owners' Loan Corporation effective October 10th, 1934 and corrected to August 1st, 1935. While such evidence was received, it is evident that the Rules and Regulations and the matter contained in the excerpts submitted are but self serving declarations of the Corporation itself. We must look to the statute to determine the purposes and aims of the Corporation and its proper functions.

From the provisions of the law itself it appears that the Home Owners' Loan Corporation when created by the Federal Home Loan Bank Board became a distinct entity, issuing stock, and selling bonds to the public, and having its own Board of Directors. The taxpayer herein was appointed by an officer of the Corporation and became its employee. He performed his duties under the direction of officers of the corporation and received compensation for his services by check of the corporation, signed by its Treasurer, payable out of funds held in the United States Treasury, for the uses of the corporation as provided by the Act.

In a well considered opinion the Attorney General of this State on February 3rd, 1930 held that employees of the United States Shipping Board Emergency Fleet Corporation, and of the United States Food Administration Grain Corporation, were not employees of the Federal Government and that their compensation was subject to tax [fol. 15] under Article 16 of the Tax Law. The Attorney General said in part:

"For its own reasons, the Government has seen fit to carry on these activities indirectly. Instead of turning them over to Departments of the Government, to be carried on by officers and employees of the Government, it has utilized independent corporations—distinct entities with legal personalities. There is no difference between the relations of employees of these corporations to the Government and the relations to the Government of employees of pure business corporations, organized for profit to their stockholders, who happen to make contracts with the United States for supplies. They are not employees of the United States but of the corporations."

Again on May 9th, 1933 the Attorney General rendered an opinion in respect of salaries or wages paid to officers and employees of the Regional Agricultural Credit Cor-

poration of Albany, holding that such officers and employees were not officers and employees of the United States Government but of an entity distinct from it and from any of its departments, and consequently their salaries if earned within the State or received by them as residents of the State, are taxable under the Personal Income Tax Law.

Upon the facts and the law as contained in the opinions of the Attorney General and the decisions of the Courts, I have reached the conclusions:

[fol. 16] (1) That the purposes of the Home Owners' Loan Corporation as set forth in law creating it, and its activities under the provisions of the Act and the Manual of Rules and Regulations above referred to, do not constitute an essential or a usual governmental function. See *People ex rel. Rogers v. Graves*, Appellate Division Third Department, November 13th, 1935, citing *South Carolina v. U. S.*, 199 U. S. 437; *Ohio v. Helvering*, 292 U. S. 360; *Flint v. Stone Tracy*, 220 U. S. 108; *Helvering v. Powers*, 293 U. S. 214, and

(2) That James B. O'Keefe, the taxpayer herein was at no time during the year 1934 an official or an employee of the United States Government, nor was his compensation received from the United States but from a distinct corporate entity, and that the taxpayer was not engaged in the performance of either an essential or a usual governmental function.

Having reached these conclusions, I find no basis under the provisions of Article 16 of the Tax Law for the exclusion from gross income of the compensation received by the taxpayer from the corporation employer.

A determination should issue affirming the denial of the claim for refund filed by the taxpayer for tax paid upon his compensation for the year 1934.

Mark Graves, Commissioner.

Dated — —, —.

[fol. 17] STIPULATION, ANNEXED TO PETITION OF JAMES B.
O'KEEFE

SUPREME COURT, ALBANY COUNTY

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation
of JAMES O'KEEFE, Relator,

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as
Commissioners Constituting the State Tax Commission
of the State of New York, Respondents

It is hereby stipulated by the attorneys for the respective parties hereto and the respondents in person, that the filing of an undertaking for costs, in compliance with the provisions of Section 375 of the Tax Law of the State of New York, be and the same is hereby waived.

Dated, New York City, April 1st, 1936.

Bogart, Calise & Di Prima, Attorneys for Relator.

John J. Bennett, Jr., Attorney for Respondents.

Mark Graves, Respondent in Person.

[fol. 18] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

RETURN OF RESPONDENTS

The respondents above named, obedient to an order and writ of certiorari duly made and entered herein, hereby make return thereto, consisting of all and singular the accounts and evidence before the State Tax Commission upon the application for revision, readjustment and refund of a certain assessment of income tax against relator, together with all the accounts, affidavits and all the evidence submitted to or which were before the State Tax Commission in, of, or concerning said account for taxes against relator, as follows:

1. New York State Resident Income Tax Return for the calendar year 1934, filed by James B. O'Keefe, verified April 12, 1935.

2. Claim for refund filed by James B. O'Keefe, verified August 16, 1935, for calendar year 1934, amount \$57.28.

3. Application for informal hearing, filed by James B. O'Keefe.

4. Transcript of formal hearing held at Albany, October 14, 1935, to which are appended Exhibits A and B-1.

5. Transcript of formal hearing held at New York February 28, 1936, to which are appended Exhibits C and D.

6. Affidavit of Joseph M. Byrne, verified the 24th day of October, 1935.

7. Letter addressed to Messrs. Bogart, Calise and [fol. 19] Di Prima under date of November 7, 1935, by the United States Employees' Compensation Commission, Washington, D. C.

8. Final determination of State Tax Commission dated March 11, 1936.

Respondents specifically deny each and every allegation contained in the petition herein, except in so far as same are shown to be true by this return.

Respondents allege that the tax imposed upon relator herein was justly and legally imposed under the laws of the State of New York.

In witness whereof, the State Tax Commission hereunto sets its hand and seal this 6th day of May, 1936.

State Tax Commission, Mark Graves, President.
John J. Merrill, Commissioner.

[fol. 20] EXHIBIT 1, ANNEXED TO RESPONDENTS' RETURN

New York State Resident Income Tax Return for the calendar year 1934, filed by James B. O'Keefe, verified April 12, 1935.

A statement as to the material facts of this exhibit is printed herein at page 55, as part of the stipulation dispensing with the printing of the entire exhibit.

EXHIBIT 2, ANNEXED TO RESPONDENTS' RETURN

Claim for refund, filed by James B. O'Keefe, verified August 16, 1935, for calendar year 1934, amount \$57.28.

A statement as to the material facts of this exhibit is printed herein at pages 55-56, as part of the stipulation dispensing with the printing of the entire exhibit.

EXHIBIT 3, ANNEKED TO RESPONDENTS' RETURN

Application for formal hearing, filed by James B. O'Keefe.

A statement as to the material facts of this exhibit is printed herein at page 56, as part of the stipulation dispensing with the printing of the entire exhibit.

[fol. 21] EXHIBIT 4, ANNEKED TO RESPONDENTS' RETURN

In the Matter of the Application for Revision of the 1934
Income Tax of JAMES B. O'KEEFE

Formal hearing had at the Albany office, Income Tax Bureau, Department of Taxation and Finance on October 14, 1935.

Appearances for the Taxpayer:

Mark A. Bogart, % Bogart, Calise & DiPrima, Counselors at Law, 38 Park Row, New York, N. Y., and Eli Phillips, % Bogart, Calise & DiPrima, Counselors at Law, 38 Park Row, New York, N. Y.

Appearances for the State Tax Commission:

Deputy Commissioner Cortland A. Wilbur and First Assistant Director Roy H. Palmer.

Mr. Bogart: Mr. James B. O'Keefe, the petitioner herein, has been employed by the Home Owners' Loan Corporation since January 25, 1934. The Corporation itself was created as an instrumentality of the United States, which shall have [fol. 22] authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such by-laws, rules and regulations as the Board may prescribe for the accomplishment of certain purposes set forth in the Act.

Mr. O'Keefe was employed as an examining attorney during the year 1934 for the purpose of assisting in carrying out the purposes for which the Corporation was created and has, of course, been an employee of the corporation for the years 1934 and 1935. He paid an income tax in the sum of \$57.28 for the year 1934. Included in the calculations determining the tax was an item of \$2246.66 earned by Mr. O'Keefe in his capacity as examining attorney for the Home Owners' Loan Corporation during the year 1934. It is the contention of the petitioner that he is exempt from taxation on his income earned in the Home Owners' Loan Corporation by the State of New York because he was an employee of the Federal government and as such was exempt from paying a state income tax.

JAMES B. O'KEEFE, being duly sworn by Deputy Commissioner Wilbur testified as follows:

Examination by Mr. Bogart:

Q. Mr. O'Keefe, are you now employed by the Home Owners' Loan Corporation?

A. Yes.

Q. When did you begin your employment with that Corporation?

A. I was certified in Washington on January 25, but I started to work on January 12, 1934 and the period from January 12 to the 25th I did not receive my salary for that until this year. Of course, that will come in this year. [fol. 23] That was \$80.00 which I did not receive until two or three months ago.

Q. During 1934 what was your position?

A. Examining Attorney.

Q. You go to work at nine o'clock every morning?

A. Yes.

Q. And work until five?

A. Yes; from nine to five on week days and nine to twelve on Saturdays.

Q. What were your duties as examining attorney?

A. When I started first we examined the files before the attorneys closed them for the last year now—

Mr. Bogart (interrupting): Limit yourself to 1934.

A. I do not just recall when we changed.

Q. You changed in June, didn't you?

A. June 1934 and we changed and examined the files after they had been closed and checked the file before they were sent to Washington.

Q. Your position is to examine the file to determine whether or not the Corporation has a first lien?

A. Yes.

Q. And also to determine the merit of the application itself?

A. Yes.

Q. In your capacity as examining attorney and as supervising attorney for the Home Owners' Loan Corporation you, of course, assisted in the performing of duties of the Corporation as set forth in the Act?

A. Yes.

Mr. Bogart: I have a letter of the Personal Supervisor of the Home Owners' Loan Corporation certifying that Mr. O'Keefe is an employee and the date of his employment. I offer this in evidence.

[fol. 24] (Letter dated October 5, 1935, signed by Joseph M. Byrne, Personal Supervisor, Home Owners' Loan Corporation, accepted in evidence and marked Exhibit "A".)

Q. For the year 1934, you paid a tax on an income of \$2908.54, net income? Is that right?

A. Yes.

Q. And of that amount the sum of \$2246.66 was earned by you as an employee of the Home Owners' Loan Corporation and a tax of \$57 28 paid and you now claim exemption on the ground you were not subject to the tax because you were an employee of the Home Owners' Loan Corporation and, therefore, an employee of the Federal Government? Is that right?

A. Yes.

Q. You are not married?

A. I am a widower.

Q. After deducting the sum of \$2246.66 from the net income earned by you during 1934, you would then have the sum of \$661.88 which would be less than \$1,000 which is the personal exemption allowed by law?

A. Yes.

Q. So if you are exempt from payment of any tax because you are a Federal employee the sum paid by you, to wit,

\$57.28 is the sum paid which is not due to the State government?

A. Yes.

Q. And you now demand the return of the tax paid by you? A. I do.

MR. JAMES B. O'KEEFE being questioned by Mr. Palmer testified as follows:

Q. Mr. O'Keefe, from whom did you receive your appointment?

A. Mr. Dorsey.

Q. Who is he?

A. The State Counsel of the Home Owners' Loan Corporation.

Q. Was that his title at the time you received this position?

A. I think he was District Counsel; Metropolitan District Counsel.

[fol. 25] Q. You received a written appointment from him?

A. Why, I—

Q. You received a designation on the 25th day of January 1934 from whom?

A. I was only told I was designated in Washington.

Q. Did you receive a written designation at any time?

A. No. My recollection is the fact that I was paid from that date.

Q. And you received no formal appointment, just by word of mouth from Mr. Dorsey?

A. Yes, and I received my check from Washington which was approval of the appointment.

Q. You did not try a Civil Service Examination?

A. No. None were under Civil Service.

Q. Did you take an oath of office?

A. Yes.

Mr. Bogart: Is this a copy of the oath you took?

A. Yes.

Mr. Bogart: I will offer that in evidence.

Mr. Palmer: I do not think this should be received in evidence. It is merely a form. I do not think that is good evidence.

Mr. Bogart: At this time I reserve the right to incorporate in the record the exact oath of office taken by Mr. O'Keefe and this is offered as the wording of the oath which Mr. O'Keefe took.

Mr. Palmer: Could you get a certified copy and file it?

Mr. Bogart: I will get a certified copy.

Examination of taxpayer.

By Mr. Palmer resumed:

Q. Mr. O'Keefe you performed or perform your duties under the direction of whom?

A. Mr. Thomas G. Grace.

Q. What was his title?

A. When I started it was under Mr. Dorsey, Leo P. [fol. 26] Dorsey who was Metropolitan District Counsel and he was succeeded by Thomas G. Grace and now I am under Joseph Sanner.

Q. You are paid how?

A. Semi-monthly.

Q. By check?

A. Yes.

Q. Who are these checks signed by? What is the form?

A. It is the United States Treasury Department. I never looked.

Q. Are they the checks of the Home Owners' Loan Corporation?

A. It is the United States Treasury Department, isn't it?

Mr. Bogart: The check is signed by P. J. Mahoney, Treasurer of the Home Owners' Loan Corporation and is drawn on the Treasury of United States.

Mr. Palmer: It is a check of the Home Owners' Loan Corporation.

Mr. Bogart: It appears to be. May I offer in evidence the Home Owners' Loan Act of 1933 as amended, preserving the right to use any portion thereof as may be necessary in purposes of appeal to any of the Courts.

(Accepted in evidence and marked Exhibit "B".)

May I also reserve the right to introduce the Manual of the Home Owners' Loan Corporation with the right to use so much thereof as may be necessary for the same purposes? We will have to leave this hearing open until I can submit

documentary evidence. We will reserve our rights to establish the principal contentions of the petitioner and we reserve our rights to set forth to the Commission the various points which we believe support our position that Mr. O'Keefe is exempt from taxation on his income by the State government.

[fol. 27] Mr. O'Keefe, in February 1, 1935 you were re-classified?

Mr. O'Keefe: I was classified as a supervising attorney.

Mr. Bogart: And your salary was fixed at \$2400?

Mr. O'Keefe: That is right.

Mr. Bogart: And was there put into effect on February 1, 1935 a 5% reduction on your salary?

Mr. O'Keefe: Yes.

Mr. Bogart: And that was a reduction which all Federal employees were receiving on their gross salary at that time?

Mr. O'Keefe: I understand so. I know in my particular case it was.

Mr. Palmer: Was that restored to you later?

Mr. O'Keefe: Yes.

Mr. Bogart: And you are now receiving the full \$2400?

Mr. O'Keefe: Yes.

Mr. Palmer: What had you been receiving before February 1, 1935?

Mr. O'Keefe: \$2400.00.

Mr. Bogart: Can I offer at this time for the record a case in which it was held that the salaries of the employees of the Home Owners' Loan Corporation are not subject to garnishment?

Mr. Palmer: It seems to me you do not need to do that to prove your facts. You can have that in your brief.

Mr. Bogart: But I want to offer it to you. I will send you that and let you have it for your purposes. I do not find it here.

MBL.

[fol. 28] EXHIBIT "A" TO TRANSCRIPT OF TESTIMONY OF
OCTOBER 14, 1935

State Office,
Home Owners' Loan Corporation,
401 Empire State Building,
New York City

October 5, 1935.

Department of Taxation & Finance, Albany, New York.

Att. Income Tax Bureau

GENTLEMEN:

Please be advised that James B. O'Keefe has been employed by the Home Owners' Loan Corporation since Jan. 25, 1934.

During the year 1934 he earned and received, as compensation for his services to the Home Owners' Loan Corporation, the sum of \$2,246.66 as Examining Attorney.

Very truly yours, (Signed) Joseph M. Byrne, Personal Supervisor.

JMB:AH.

EXHIBIT "B-1" TO TRANSCRIPT OF TESTIMONY OF OCTOBER 14,
1935

Home Owners' Loan Act of 1936, as Amended
(Omitted Pursuant to Stipulation)

[fol. 29] EXHIBIT 5, ANNEXED TO RESPONDENTS' RETURN

[Same Title]

Formal hearing had at the New York Office, Income Tax Bureau, Department of Taxation and Finance, on February 23, 1936, at two o'clock in the afternoon.

This is a Continuation of a formal hearing held in this matter on October 14, 1935.

Appearances for the Taxpayer:

Mark A. Bogart, % Bogart, Calise & DiPrima, Counselors-at-Law, 38 Park Row, New York, N. Y., and Eli Phillips, % Bogart, Calise & DiPrima, Counselors-at-Law, 38 Park Row, New York, N. Y.

Appearances for the State Tax Commission:

First Assistant Director Roy H. Palmer.

Witness: Leo P. Dorsey.

Harriet Zobel, Hearing Steno.

NOTE.—Copy of the Federal Home Loan Bank Act as Amended and the Home Owners' Loan Act of 1933 as Amended, published under date of May 28, 1935, is to be substituted for the copy filed as Exhibit "B" in the former hearing, and will be marked Exhibit "B-1".

[fol. 30] LEO P. DORSEY, being duly sworn by Mr. Palmer, testified as follows:

Examination by Mr. Bogart:

Q. Mr. Dorsey, your position is that of State Counsel to the Home Owners' Loan Corporation in the State of New York, is that right?

A. It is.

Q. How long have you been identified with the Corporation?

A. Since its organization or inception in the State of New York, July, 1933.

Q. And in your capacity as State Counsel and any other position you might have held during that period, you have become familiar and are familiar with the operations of the Corporation in the State of New York?

A. Yes.

Q. I show you this manual and ask you to identify this as a manual of the rules and regulations of the Corporation.

A. Yes, it is.

Q. The official manual?

A. The official manual of the Corporation governing the operation of the Corporation in the State offices.

Mr. Bogart: I offer in evidence the Manual, "Rules and Regulations of the Home Owners' Loan Corporation", spe-

cifically reserving the right to use only such portions thereof as we deem essential for the purposes of this proceeding and the appeal to the Courts, and with the privilege of substituting in its place an exact copy or duplicate of this Manual.

Mr. Palmer: It may be admitted.

Q. Mr. Dorsey, I ask you to identify this as HOLC Form No. 71, revised as of June 7, 1935, which is obtained for and is essential to the closing of any loan by the Corporation in the State of New York.

A. I so identify it, and it is used in all cases where we [fol. 31] close or grant loans to applicants.

Mr. Bogart: I offer in evidence a blank form of Form 71.

Mr. Palmer: The Manual, "Rules and Regulations of the Home Owners' Loan Corporation" will be marked for identification as Exhibit "C".

(Form 71 is received and marked as Exhibit "D".)

Mr. Bogart: I will read from page 1 of the Manual part of the statement of John H. Fahey, Chairman of the Board of the Home Owners' Loan Corporation:

"The Home Owners' Loan Corporation was created to meet an emergency. Its function is to extend relief to distressed home owners who are in imminent danger of losing their homes through foreclosure; or, who, having no mortgage on their property, find it impossible to obtain money from established lending agencies with which to pay taxes and other encumbrances, or to provide for the necessary maintenance or re-conditioning of their home property."

Examination by Mr. Palmer (Mr. Dorsey testifying):

Q. Mr. Dorsey, has the Home Owners' Loan Corporation a separate organization for the State of New York?

A. The operations of the Home Owners' Loan Corporation are carried out in each of the forty-eight states by Separate State organizations, none of the officers or employees of one state having any authority or functions to [fol. 32] perform in another state. In that respect, it is a separate entity in the State of New York and in each of the other forty-eight states, qualified in this one respect: That over the State Office there is what we call a Regional Office throughout various regions of the United States, the local

region being the region of New York, New Jersey and Connecticut, but the State organization, as such, is a separate entity.

Q. Where does this Regional organization have its principal office?

A. It so happens that it has its principal and only office in New York City.

Q. At the same address where the New York State organization is?

A. No, separate addresses—the State organization is on Fifth Avenue; the Regional organization is on Forty-Second Street.

Q. Who is the head of the State organization?

A. Vincent Dailey is the State Manager.

Q. And who is the head of the Regional organization?

A. Merrill Hunt is the Regional Manager.

Q. What jurisdiction does the Regional Office have over the New York unit?

A. It has more or less of a supervisory jurisdiction over the State Office. The Regional Offices grew up in this way: Originally it was contemplated that each of the forty-eight State organizations would report directly to Washington. On account of the volume of business and the necessity for a tremendous organization in Washington to keep in contact with each of the forty-eight State organizations, the Washington Office decided to more or less divert some of the functions that would ordinarily be conducted in Washington to the Regional Offices to take away some of the burden of the detailed supervision from the Washington Office.

Q. Do the Regional Offices have anything to do with the appointment of employees or officers of the New York State organization?

A. It has nothing to do with such appointments except in a supervisory way. In every instance the state organization recommends the appointment of officers and employees. The recommendation goes to the Regional Office. It is approved or criticized, as the case might be, and then when it has met the approval of the Regional Office, it is submitted to Washington. The appointments are submitted to Washington for approval in most of the instances by the Board of Directors. The Regional Office is more or less of a clearing house.

Q. How far down the line of employees does that go?

A. That goes down to the smallest employee, whether he is a messenger boy or an order clerk.

Q. And when you say that it must go to Washington, you mean that it must go to the main office of the Home Owners' Loan Corporation?

A. Yes, we are now speaking of appointments.

Q. Yes. Does the Regional Office have anything to do with the approval or disapproval of loans made by the New York unit?

A. No, it does not. The State Office is a complete functioning office in so far as the processing of applications for loans is concerned, with a few qualifications. There are some cases where the regulations from the Home Office require that certain definite cases, which are a very minor [fol. 34] percentage of the cases, must go to the Home Office for approval. Very recently that has been changed—within the past ten days—so that they now go to the Regional Office instead of the Home Office. On the other hand, there are certain qualifications to that new set-up, so that the Regional Office in certain cases must again submit them to Washington, but that covers a very minor percentage of the loans.

Q. The New York State organization is not a separate corporation, is it?

A. Oh, no, there is but one corporation.

Q. And I assume that being a Federal organization, the Home Owners' Loan Corporation did not have to apply to the State of New York for the right to carry on business within the State?

A. That's correct, and the Home Owners Act specifically provides that it shall not be subject to restrictions placed upon corporations by the various states, except that it is required to pay real estate taxes on property actually owned by the corporation.

Q. Coming to the New York organization, how many offices does it maintain in the State?

A. At present it maintains five offices in the State: New York City, Albany, Syracuse, Rochester and Buffalo.

Q. Each in charge of a manager?

A. Each of those offices is an autonomous fully functioning office under the direction of the State Manager, each office being in charge of a District Manager.

Q. And each performing similar functions in their district?

A. The functions are the same in each district.

[fol. 35] Q. All appointments to positions in those district offices are made how?

A. They are recommended to the State Manager by the District Manager. The State Manager in turn recommends them to the Regional Office, and the Regional Office in turn recommends them to Washington. Originally, the Board of Directors passed upon each employee of the Corporation. I understand that within recent months it has been changed, so that while the Washington Office passes on all appointments, certain low-salaried brackets have been eliminated in respect to those appointments having to go before the Board.

Q. I take it that the District Manager or the State Manager at least can put people to work by an appointment, which is subject to the approval of the Board of Directors, is that so?

A. To a very, very limited extent. Originally, when we set up our organization, that was true, but now that we have the organization well set up and smoothly running, it would be in the most unusual cases of emergency where a District Manager could make an appointment.

Q. How are the expenses of the office paid other than salaries?

A. The expenses of the office are paid always by checks on the Treasury of the United States, signed by the Treasurer of the Corporation.

Q. Are the Home Owners' Loan Corporation checks drawn on the Treasury of the United States?

A. That's right.

Q. Are the expenses of the offices paid upon vouchers for each item, or is each District Office or the State unit entitled [fol. 36] to draw checks and be reimbursed by the Corporation for those expenses?

A. No, neither the State nor the District Offices has a checking account; all checks are drawn against vouchers.

Q. Now, coming to the method of handling loans, to what class of risks may loans be made by the HOLC?

A. In answering that question, I would like to point out that the word "loan" or "loans" should be used in a qualified sense. The operations of the Home Owners' Loan Corporation are more of a refunding or refinancing operation than a loaning operation. For example, a person could own a piece of home property free and clear of any indebtedness

or taxes, and such person could not and would not be eligible for a loan on that unencumbered property. Rather, the Corporation refunds on a long term basis existing mortgages and taxes, both of which are in default when the home owner is actually in distress, cannot obtain mortgage financing elsewhere, and establishes to the Corporation's satisfaction that he is in distress, that he cannot refund elsewhere, and that the property is otherwise within the limitations of the Home Owners' Loan, such as being not more than a four-family house, being the home owner's actual homestead, being valued by the Corporation at an excess of \$25,000, etc. In other words, it is a refunding operation, rather than a direct loaning operation. In no case does the applicant home owner receive money directly from the Corporation. It is always paid to the home creditors such as mortgages or judgment creditors or to the taxing subdivisions.

[fol. 37] Mr. Bogart: Mr. Dorsey, when you say that the home owner is unable to re-finance or refund his indebtedness elsewhere, do you mean to refund it through private lending institutions that are ordinarily engaged in the loaning of moneys on real estate such as banks and mortgage companies?

Mr. Dorsey: No, not necessarily if he has any means of refunding his obligations, whether it be through the ordinary lending channels or through relatives, friends or otherwise.

Mr. Bogart: But it specifically includes lending institutions like banks, trust companies and mortgage companies.

Mr. Dorsey: It does.

Mr. Bogart: So that in any given case where it would appear that the applicant is able to obtain a loan from any private institution which would permit him to carry on the indebtedness on his property, or to refund the indebtedness, then in that case the applicant is ineligible.

Mr. Dorsey: That's right.

Q. But it makes no difference whether the mortgage is an institution, corporation or an individual, so long as the owner of the property is in distress and cannot find any means of refunding the indebtedness?

A. That's right.

Mr. Bogart: Does that include any provisions for advancing money for repairs or improvements?

Mr. Dorsey: Yes, the Corporation is authorized, in con-[fol. 38] nection with refunding a home owner's home mortgage obligations, to make advances for necessary repairs, and, in some instances, for the improvement of home properties. Again, these advances are not to the home owner, but to the contractor who does the work.

Q. But that in itself, though, becomes an advance outside of the mortgage obligations, does it not?

A. Technically, yes, but, practically, no, for the simple reason that in granting or making these refunding loans, it is necessary for the Corporation to see that its security is in a good state of repair.

Q. But assuming that a home owner had a piece of property which was mortgaged to the bank for we assume sixty per cent of its value, and it was assumed that the security was entirely good for the amount of the loan, could the home owner then come to the HOLC and borrow money to put an addition on the house or to put a new heating system in, and obtain an advance from the HOLC for that purpose?

A. Provided he came within the rules and regulations and restrictions set up by the Corporation, he could get such an advance.

Q. So that would not be a refunding operation?

A. That's true, except those operations, those actual improvement cases are so few in number that they are practically negligible.

Q. But the HOLC is authorized to make such advances?

A. That's right.

Q. And while the advances are made direct to the contractor, nevertheless the HOLC takes back a mortgage or some other obligation from the owner?

[fol. 39] A. Yes, the amount so advanced is included in the bond and mortgage.

Mr. Bogart: But would that be true in a case, Mr. Dorsey, where we don't already have a mortgage on the home of the applicant?

Mr. Dorsey: In no case would we make such an advance for improvement unless there was either a mortgage to the Corporation in existence or one being put on simultaneously with the advance in connection with a refunding operation of the existing mortgage.

Q. In other words, the advance would only be made in a case where the owner could not obtain the funds elsewhere.

A. That's right.

Mr. Bogart: If I understood Mr. Palmer correctly, Mr. Palmer indicated a case where the mortgage was held by a bank and the applicant desired a loan for improvement of his property aside from the refunding of the mortgage which the bank held.

Mr. Dorsey: I am afraid I misunderstood Mr. Palmer's question. In the case that Mr. Palmer outlined, we would not grant any advance for repairs or improvement.

Mr. Bogart: In other words, no advance is ever made except in connection with the refunding of the liens against the premises and where it appears that the applicant is in distress and cannot refund or re-finance the indebtedness elsewhere, or where the Corporation makes an advance in a case where it already has given a loan to the applicant, [fol. 40] that advance being for the purpose of preserving the security.

Mr. Dorsey: That is so. In other words, no refunding loan is made, no advances for repairs or improvements are made unless the elements of distress are present and unless any advances for repairs or improvements are carried out in connection with the refunding of the defaulted existing encumbrances.

Q. I understood you, Mr. Dorsey, to say that if property was already encumbered by a mortgage to the extent that the owner could not raise additional funds for improvement on that property, that advances might be made for improvements by the HOLC, even though the HOLC was not attempting to refund or refinance that property.

A. I am afraid that I misunderstood your question, and therefore I gave the incorrect answer. Again repeating in the case which you just outlined, we would not make such an advance.

Mr. Bogart: I show you a copy of Exhibit "D", and ask you to identify it as an exact duplicate of the exhibit on record.

Mr. Dorsey: I so identify it.

Mr. Bogart: Mr. Dorsey, is this form, property executed by the home owner, required in every instance where a loan is made?

Mr. Dorsey: Yes.

Mr. Bogart: And the form is obtained before any loan is approved by the Corporation?

[fol. 41] Mr. Dorsey: Yes. I might qualify that in this way. Originally, the Act provided that if the mortgage was held by a bank or other financial institution in liquidation, the element of distress would not have to be proven, but the Act has been amended in that respect for several months last past.

Q. Up to what point are loans made on property, that is, what is the percentage of equity or of value of property against which such loans are made?

A. The Corporation is permitted to loan up to eighty per cent of the Corporation's appraised value of the property, the maximum loan being \$14,000.00. On the other hand, not every loan is an eighty per cent loan. There might be certain features of the property whereby the Corporation would limit the loans below the eighty per cent to which it is authorized to go.

Q. Do you mean in that case that if the existing loans were more than eighty per cent of the appraised value of the property that the HOLC could give no relief to the owner?

A. Oh, no, not at all. In most instances the mortgagees realize in such cases that the property is probably over-mortgaged, and they are, therefore, willing to adjust the amount of indebtedness to them to come within the amount that we feel we can loan on the property.

Q. Now, the employees of the HOLC conduct all of the negotiations for these loans with the home owners, make appraisals of the property, search the titles, and perform all the functions necessary to carry out the loans or the [fol. 42] making of loans or the denial of the applications for loans?

A. The Home Owners' Loan Corporation work is carried on by two classes of people: one class is referred to as salaried employees—full time employees working for fixed monthly salary. Other functions are carried by fee personnel, people who get paid per case that they work on for a stated amount. Consequently, all of the routine office work in connection with the processing of a loan application is done by salaried employees, except one appraisal, which is made by a fee appraiser, and a re-conditioning or repair inspection likewise done by a fee inspector, and the title closing which is done by an attorney on a fee basis. In

connection with the title search which you mentioned, that is carried out in two ways: In Metropolitan New York, the Corporation obtains the Certificates of Title from a title or abstract company, and furnishes them to the fee attorney who closes the loan. Up State New York the fee attorney either prepares or procures at his own expense the abstract of title.

Q. Mr. O'Keefe, the taxpayer here, was an attorney, and as I understand his testimony, he had something to do with searching titles, is that correct?

A. Well, he reads titles, that is the certificates which were sent in by the title companies, and they would be looked at, read and examined before sending the file to the closing attorney to see if there were any defects in title, particularly defects that could not be cured, and, likewise, to examine the Certificates of Title after the return of the file by the [fol. 43] closing attorney prior to the loan closing, in order to see that all objections and defects were properly disposed of by the closing attorney.

Mr. Bogart: Mr. O'Keefe testified that he was employed first as an examining attorney, and, subsequently, as a supervising attorney, and there was submitted in evidence a letter dated October 5, 1935, signed by Joseph M. Byrne, Personnel Supervisor, evidencing the same. Is that right, Mr. Dorsey?

Mr. Dorsey: That's right.

Q. Were any of the employees of the HOLC in 1934 under Civil Service?

A. The employees were not under Civil Service. Your question is susceptible to two answers. Some of them might have been Civil Service employees working for us, but none of the employees of the Home Loan are subject to Civil Service.

Q. Yes. Have they been put under Civil Service since 1935?

A. Not that I know of.

Mr. Palmer: I think that is all I wanted to ask.

By Mr. Bogart (Mr. Dorsey testifying):

Q. There is no solicitation of business by the Corporation, is that right?

A. Absolutely not; as a matter of fact, we try to discourage the granting of loans, and wherever we can find a home

owner who is ineligible for a loan because of lack of distress, or for any other reason, we endeavor to get other private lending agencies to refund his obligations for him. [fol. 44] Q. And in cases where it appears definitely that there is no distress, is it the policy of the Corporation to refer those cases to various private lending institutions?

A. It is. The Corporation has had for many months in operation a Department whose sole functions are to contact savings and loan associations, savings banks and lending companies, advising them of many applicants that have been rejected by the Home Owners' Loan Corporation that would eventually make sound loans, sound investments for such other lending institutions, and the other lending institutions have refunded many such applications.

Q. Is it correct to say, Mr. Dorsey, that it is not the purpose of the Home Owners' Loan Corporation to make a profit?

A. That's correct. The purpose of the Corporation is to relieve distress, and to keep people in their homes in times of a National emergency.

Q. And, accordingly, the rate of interest is fixed so that the difference between the rate charged to the home owners and the rate paid on account of the bonds issued by the Corporation is to pay for the operating expenses of the Corporation?

A. That's right.

Q. The fixing of the rate of interest in no way depends upon the current rate of interest that prevails where a private lending institution might loan money on similar liens; in other words, where a private lending institution might give a particular home owner a loan and take back as security a mortgage on the premises of the home owner, the fact that the lending institution might charge five or six per cent interest does not affect the rate which is fixed [fol. 45] by the Home Owners' Loan Corporation?

A. No, because our rate is fixed by statute.

Mr. Palmer: What rate is charged by the HOLC?

Mr. Dorsey: Five per cent for a—let me answer that. We are authorized to make and carry out our refunding operations by exchanging our bonds for the mortgages held by the mortgagees on the homes of the distressed home owners. Where the mortgagee accepts the bonds, we charge five per cent interest to the home owner. There is another negligible class of cases—I think we have only had six of

them in New York State—where the mortgagee will not accept our bonds in exchange for his mortgage. We are under very limited and very strict restrictions permitted to advance cash to the mortgagee. In that case, we charge six per cent interest, but that category can entirely be eliminated, because there are only six or seven cash loans in the State of New York out of the seventy-eight thousand total loans that we have made.

Q. In the event that it appears that the Corporation is making a profit, has Congress the power to reduce the rate of interest?

A. I assume that it has.

Mr. Palmer: I have no further questions, Mr. Bogart.

Mr. Bogart: Neither have I.

(Hearing adjourned.)

[fol. 46] EXHIBIT "C" TO TRANSCRIPT OF TESTIMONY OF
FEBRUARY 28, 1936.

Excerpts from manual of rules and regulations of Home
Owners Loan Corporation.

Purpose of the Home Owners' Loan Corporation.

"As a further and urgently necessary step in the program to promote economic recovery, I ask the Congress for legislation to protect small house owners from foreclosure and to relieve them of a portion of the burden of excessive interest and principal payments incurred during the period of higher values and higher earning power. Implicit in the legislation which I am suggesting to you is a declaration of national policy. This policy is that the broad interests of the Nation require that special safeguards should be thrown around home ownership as a guaranty of social and economic stability, and that to protect home owners from inequitable enforced liquidation, in a time of general distress, is a proper concern of the Government."—President Franklin D. Roosevelt in his message to Congress, April 13, 1933.

Preface—Page 1

The Home Owners' Loan Corporation was created to meet an emergency. Its function is to extend relief to distressed

home owners who are in imminent danger of losing their homes through foreclosure or, who having no mortgage on their property, find it impossible to obtain money from established lending agencies with which to pay taxes and other encumbrances, or to provide for the necessary maintenance [fol. 47] or reconditioning of their home property.

Mortgage distress is a financial condition. It can also be a state of mind. Many are mentally in mortgage distress who are not financially so. If a mortgage loan will be carried by the present mortgagee without foreclosure, or the mortgage burden can be financed elsewhere, then the loan is not eligible in the Home Owners' Loan Corporation and must not be granted.

Ch. III—p. 5

(5) Form No. 71—(a) Compliance with Section 4-1 of the H. O. L. C. Act, as Amended, requires that Form No. 71 must accompany each application.

(b) In all cases where applications were taken prior to April 27, 1934, and which have not been advanced to the Legal Department the applicants must be called in and their execution of Form No. 71 required before such applications are approved for further progress. When such cases have been advanced to the Legal Department, the closing attorney must have Form No. 71 executed prior to closing.

(c) With respect to new applications, it is required that the applicant execute Form No. 71 prior to advancing the case beyond the Application Section. The execution of Form No. 71 should be accomplished only after a thorough consideration and understanding of the significance of this form.

[fol. 48] (6) Evidence of Inability to Refinance—Responsibility shall remain upon the State Manager and his assistants to see to it that applicants have made reasonable efforts to refinance their mortgages through other channels and to determine as a matter of fact that such applicants in the opinion of the State Manager are unable to refinance through other channels before certificate on Form No. 71 is executed, and no loan shall be permitted by the State Manager when such certificate on Form No. 71 cannot properly be executed.

Ch. V—p. 3

Reconditioning:

1. There shall be a Reconditioning Division, which shall direct and supervise all necessary maintenance and necessary repairs and all maintenance, repair, rehabilitation, rebuilding and enlargement, as is provided in the statute.

2. The Reconditioning Division shall see to it that the owners of property maintain, repair and improve their properties at their own expense for their own protection and for the protection of the Corporation where they are able to do so. Where such owners are unable adequately to maintain, repair and improve their properties the Reconditioning Division shall conduct such work as may be necessary for the full protection, and for the best interests of the Corporation.

Ch. XIV—p. 12.1

[fol. 49] 16. Employees Must Pay Their Debts:

The Home Owners' Loan Corporation is not subject to garnishment.

Ch. XIV—p. 13

17. Salaried Employees Entitled to Benefits of Federal Employees' Compensation Act:

Salaried employees of the Home Owners' Loan Corporation are entitled to the benefits of the Federal Employees' Compensation Act, as Amended (U. S. Code, Title 5, Chapter 15: 39 Statutes at Large 742.)

EXHIBIT "D" TO TRANSCRIPT OF TESTIMONY OF FEBRUARY 28,
1936

HOLC Form No. 71, Revised June 7, 1935

Statement of Applicant for Compliance With Section 4 (1)
of Home Owners' Loan Act, As Amended

Home Owners' Loan Act, as amended, Sec. 8 (a): Whoever makes any statement, knowing it to be false, or whoever willfully overvalues any security, for the purpose of in-

fluencing in any way the action of the Home Owners' Loan Corporation or the Board of an association upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this Act, or any extension thereof by renewal deferment, or action or otherwise, or the acceptance, release, or substitution of security therefor, shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than two years, or both.

_____, _____,
_____ —, 1935.

Application No. —.

Name of Applicant — — —.

The undersigned applicant to the Home Owners' Loan Corporation for a loan upon the applicant's home property understands that under the Home Owners' Loan Act of 1933 as amended, he is not entitled to a loan unless the mortgage or other obligation or lien which it is sought to be taken up was in involuntary default on June 13, 1933, with respect to the indebtedness on said property and that he is unable to carry or refund his present indebtedness, or if default occurred after June 13, 1933, that such default was due to unemployment or to economic conditions or misfortune beyond the control of the applicant.

(1) On June 13, 1933, the following payments on the indebtedness on the applicant's home were in involuntary default:

Principal \$—. Interest \$—. Taxes \$—.

Give date of first default: — —, —.

(2) Applicant was unable to make these payments because
_____.

(3) Since June 13, 1933, applicant has made the following payments on the indebtedness on applicant's home (give dates and amounts):

Principal \$—. Interest \$—. Taxes \$—.

[fol. 51] (4) At present the following payments on the indebtedness on applicant's home are in involuntary default:

Principal \$—. Interest \$—. Taxes \$—.

(5) Applicant has been employed during this period of default for the times and at the places as follows:

Time: ——. Place: —.

(6) Applicant is unable to make the payments now overdue because —.

(7) Applicant has made diligent effort to obtain loan to refund the indebtedness on his home, and has been unable to do so.

(8) Applicant is unable to carry or to refund the indebtedness on his home because —.

(9) Is the loan applied for desired to relieve in part or in whole financial embarrassment in business, or from banking obligations? If so, give details: —.

(10) Is there any agreement between you and the mortgagee at this time in reference to refunding your debt which you have not divulged to this Corporation? If so, state what it is: —.

The applicant makes the foregoing statements in order to induce the Home Owners' Loan Corporation to refund the indebtedness against the applicant's home.

— —, Applicant.

[fol. 52] Form No. 71 taken by — —.

Relying upon above statements and believing them to be correct, I approve the same as in compliance with Section 4 (1) of Home Owners' Loan Act of 1933 as amended.

— —, — —,
Title of Officer of Corporation.

Instructions to be observed for procuring proper execution of above:

The employee of the Home Owners' Loan Corporation who takes the above statements from the applicant must see that each item is answered fully.

The applicant should be advised that any wilful misstatement is a violation of the Home Owners' Loan Act as Amended, and is punishable by fine and imprisonment.

The applicant should be closely questioned as to when the default occurred and the blanks above should be fully filled in.

If the officer of the Corporation is not reasonably satisfied with the truth of the statements made and subscribed by the applicant, then, before proceeding further the officers of the Corporation should take the matter up with the mort-

gagge and others, and investigations should be made concerning the facts.

The approval provided for in the form should be signed by the State or District Manager.

[fol. 53] EXHIBIT 6, ANNEXED TO RESPONDENTS' RETURN

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Joseph Byrne, being duly sworn, deposes and say:-

I am personnel supervisor of the State office of the Home Owners' Loan Corporation and have personal knowledge of the form of oath taken by all employees of the Home Owners' Loan Corporation.

Annexed hereto is an exact copy of the oath of office required to be taken by each employee of the Home Owners' Loan Corporation.

Joseph M. Byrne.

Sworn to before me this 24th day of October, 1935.
Edward Klein, Notary Public, Queens County.
Queens Co. Clerk's No. 3101, Reg. No. 7402. N. Y.
Co. Clerk's No. 871, Reg. No. 7K537. Kings Co.
Clerk's No. 92, No. 7365. Commission Expires
March 30, 1937.

Oath of Office

Prescribed by Section 1757, Revised Statutes of the United States

.....
(Department or Establishment) (Bureau or Office).

I,, do solemnly swear (or
Name in full printed or typed
affirm) that I will support and defend the Constitution of
[fol. 54] the United States against all enemies, foreign and
domestic; that I will bear true faith and allegiance to the
same; that I take this obligation freely, without any mental
reservation or purpose of evasion; and that I will well and
faithfully discharge the duties of the office on which I am
about to enter. So help me god.

(Signature of Appointee:) — — —.

Subscribed and sworn to before me this — day of
 —, A. D. 193—, at (City or Place) —. —. —.
 (State.) (Seal.)

NOTE.—If the oath is taken before a Notary Public the date of expiration of his commission should be shown.

Position to which appointed —.

Date of entrance on duty — —, —.

[fol. 55] EXHIBIT 7, ANNEXED TO RESPONDENTS' RETURN

Official Correspondence Should be Addressed to the
 Commission

United States Employees' Compensation Commission,
 Washington

Commissioners: — —.

Wm. McCauley, Secretary.

Jewell W. Swofford, Chairman.

November 7, 1935.

In Reply Refer to File No. —

Harry Bassett, John M. Morin, Bogart, Calise & Di Prima,
 Counselors at Law, 38 Park Row, New York, N. Y.

GENTLEMEN :

The Commission has received your letter of November 4, 1935, in which you request to be advised whether under a ruling of the Commission employees of the Home Owners' Loan Corporation have been held to be civil employees of the United States.

Under date of November 27, 1933, the Commission held that regular employees of the Home Owners' Loan Corporation are civil employees of the United States within the meaning of the Federal Employees Compensation Act of September 7, 1916. This decision was communicated to the Chairman of the Board of Directors of the Home Owners' Loan Corporation in a letter dated November 28, [fol. 56] 1933. In keeping with this decision employees of

that Corporation suffering injuries while in the performance of official duty have been extended the benefits authorized by this Compensation Act.

Very truly yours, (Sig.) Wm. McCauley, Secretary.

EXHIBIT 8, ANNEXED TO RESPONDENTS' RETURN

This exhibit is identical with Schedule A, annexed to Petition of James B. O'Keefe, printed herein at pages 8-9.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD
DEPARTMENT

[Title omitted]

STIPULATION AS TO CERTAIN EXHIBITS

It is hereby stipulated by the attorneys for the respective parties hereto that the material facts contained in items 1, 2 [fol. 57] and 3 of the return herein are as follows:

1. In relator's resident income tax return for the calendar year 1934, he reported as taxable income the sum of Two thousand two hundred forty-six and 66/100 (\$2246.66) dollars as salary received as an attorney at law in the employ of the Home Owners' Loan Corporation upon which salary a tax was paid.

2. On August 16th, 1935, relator filed a claim for refund of the tax paid for 1934 in which he stated that his salary from the Home Owners' Loan Corporation was earned by claimant as an employee of the Federal Government engaged in the performance of a governmental function and therefore was exempt from New York State Income Tax; that his total net income for 1934 was \$2908.54 of which \$2246.66 was salary from the Home Owners' Loan Corporation; that, since the salary from the Home Owners' Loan Corporation was not taxable, his net taxable income for 1934 was \$661.88 which was less than the One thousand (\$1,000.00) dollars personal exemption to which he was entitled; that, therefore he was entitled to a refund of the \$57.28 tax he had paid for 1934.

3. On August 16th, 1935, relator filed an Application For Informal Hearing to review and decide the question as to whether or not relator was entitled to a refund of the tax paid for 1934 for the reasons stated in the Claim for Refund.

4. It is further stipulated that said Items 1, 2 and 3 of the Return need not be printed in the record of this proceed-[fol. 58] ing and that this stipulation be printed in their place.

It is further stipulated that Exhibit B-1 to the transcript of testimony of October 14, 1935, consisting of a copy of the amended Home Owners' Loan Act of 1936, be omitted from the printed record.

Dated, September 23, 1936.

Bogart, Calise & Di Prima, Attorneys for Relator.
John J. Bennett, Jr., Attorney General, Attorney
for Respondents.

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss.

William J. Calise being duly sworn says:

I am a member of the firm of Bogart, Calise & Di Prima, the attorneys for the petitioner in this proceeding and am familiar with all the proceedings herein.

No opinion was delivered by the Court below in making the order for the writ of certiorari herein.

William J. Calise.

Sworn to before me this 23rd day of September, 1936.
Jacqueline Leo, Notary Public, New York County.

[fol. 59] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing are true and correct copies of the petition for a writ of certiorari, the order

granting the writ of certiorari, the writ of certiorari, the return to the writ of certiorari, and the exhibits and pertinent and material parts of exhibits annexed to said return, and the whole thereof, which are on file in the office of the Clerk of the County of Albany; and certification thereof is hereby waived.

Dated, New York, N. Y., September 23, 1936.

Bogart, Calise & Di Prima, Attorneys for Relator.
John J. Bennett, Jr., Attorney General, Attorney
for Respondents.

[fol. 60] IN SUPREME COURT OF NEW YORK, COUNTY OF
ALBANY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

Please take notice that the respondents above named hereby appeal to the Court of Appeals from the final order of the Appellate Division, Third Department, entered in the office of the Clerk of Albany County on the 17th day of January, 1938, which said final order annulled a determination of the respondents denying the application of the relator for a revision and resettlement of the computation of his personal income tax for the calendar year 1934 and for a refund of a portion of said tax; and the said respondents hereby appeal from each and every part of said final order.

Dated, Albany, New York, January 28, 1938.

Yours, etc., John J. Bennett, Jr., Attorney-General of
the State of New York, Attorney for Respondents,
Capitol, Albany, New York.

[fol. 61] To: Daniel McNamara, Jr., Esq., Attorney for
Relator, 322 Ninth Street, Brooklyn, N. Y. Hon. John A.
Knox, Clerk of Albany County, Court House, Albany, N. Y.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation
of JAMES B. O'KEEFE, Relator,
against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as
Commissioners constituting the State Tax Commission of
the State of New York, Respondents

ORDER APPEALED FROM—December 29, 1937

A writ of certiorari having been duly granted at a Special Term of the Supreme Court, held in and for the County [fol. 62] of Albany, on the 18th day of April, 1936, to review the final determination of the respondents, Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, denying the application of the relator, James B. O'Keefe, for a revision and resettlement of the computation of his personal income tax for the calendar year 1934, and for a refund of the sum of \$57.28, the said personal income tax paid by the relator for the said calendar year 1934, and the respondents having duly appeared and filed their return thereto, and this proceeding having been duly heard at a Term of this Court, held at the City of Albany, in the State of New York, on the 10th day of November, 1937, and this Court having duly made and filed its decision herein wholly annulling the said final determination, with \$50.00 costs and disbursements, now on motion of Daniel McNamara, Jr., Esq., attorney for the relator, it is

Finally Ordered that the said final determination be and the same hereby is wholly annulled; that the said application be and the same hereby is in all respects granted, and that the respondents refund to the relator the sum of \$57.28, the said personal income tax paid by the relator for the calendar year 1934; and that the relator recover of the respondents the sum of \$50.00 costs and his disbursements of this proceedings, and that the relator have execution therefor.

John S. Herrick, Clerk.

[fol. 63] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION

[Title omitted]

ORDER OF SUBSTITUTION OF ATTORNEY—March 9, 1937

On reading and filing the stipulation, dated the 22nd day of March, 1937, signed by Bogart, Calise & DiPrima, Esqs., the attorneys for the relator, and signed and acknowledged by James B. O'Keefe, the relator, it is

Ordered, that Daniel McNamara, Jr., Esq., of 322 Ninth Street, Borough of Brooklyn, City of New York, be and he hereby is substituted as the attorney for the relator in the above entitled proceeding, in the place and stead of Bogart, [fol. 64] Calise & DiPrima, Esqs., of No. 38 Park Row, Borough of Manhattan, City of New York.

John S. Herrick, Clerk.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION. THIRD
JUDICIAL DEPARTMENT

Decision Handed Down 410-16

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. JAMES B.
O'KEEFE, Relator,

v.

MARK GRAVES and Others, as Commissioners, Constituting
the State Tax Commission of the State of New York,
Respondents

DECISION

Determination annulled, with fifty dollars costs and disbursements.

Relator is the regularly retained attorney for the Federal Home Owners' Loan Corporation. His salary is not subject to tax under People ex rel. Rogers v. Graves (299 U. S. 401).

Hill, P. J., McNamee and Bliss, JJ., concur.

Crapser, J., dissents with an opinion in which Heffernan, J., concurs.

[fol. 65] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION,
THIRD DEPARTMENT

410-16

[Title omitted]

DISSENTING OPINION

This is a review, by certiorari, of a final determination of the State Tax Commission denying relator's application for the refund of income tax paid with respect to the calendar year 1934.

Bogart, Calise & Di Prima, Attorneys for Relator, No. 38 Park Row, New York City.

Hon. John J. Bennett, Jr., Attorney General, Attorney for Respondents, Capitol, Albany, N. Y.

[fol. 66] Opinion for Confirmation

CRAPSER, J.:

The relator is a resident of the City of Long Beach, New York. He duly made a personal income tax return pursuant to the Tax Law of the State of New York and paid an income tax of \$57.28 for the year 1934. Thereafter and on or about August 16th, 1935, he duly made application, pursuant to Section 374 of the Tax Law, for a refund of the foregoing tax which was denied by the tax commission.

He bases his claim upon the fact that the tax paid for the year 1934 was based on a net income of \$2908.54 of which \$2,246.66 was salary earned as an attorney at law in the employ of the Home Owners' Loan Corporation which corporation the relator alleges is an instrumentality of the United States Government and that such part of his income as was earned as an employee of the Home Owners' Loan Corporation is exempt from the New York State Income Tax.

Section 4 (j) of the Home Owners' Loan Act of 1933 (June 13, 1933, c. 64, 48 Stat. 128; 12 U. S. C. A. §§ 1461-1468) reads:

"The Corporation shall have power to select, employ and fix the compensation of such officers, employees, attorneys, or agents as shall be necessary for the performance of its duties under this Act, without regard to the provisions of

other laws applicable to the employment or compensation [fol. 67] of officers, employees, attorneys, or agents of the United States. No such officers, employee, attorney, or agent shall be paid compensation at a rate in excess of the rate provided by law in the case of the members of the Board. The Corporation shall be entitled to the free use of the United States mails for its official business in the same manner as the executive departments of the Government, and shall determine its necessary expenditures under this Act and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditure of public funds. The Corporation shall pay such proportion of the salary and expenses of the members of the Board and of its officers and employees as the Board may determine to be equitable, and may use the facilities of Federal Home Loan Banks, upon making reasonable compensation therefor as determined by the Board."

The term "Board" as used above means the Federal Home Loan Bank Board.

Under this statutory authority, relator received a verbal appointment from the Metropolitan District Counsel of the Corporation without the necessity of participating in a competitive civil service examination. By statute, provisions of law applicable to officers and employees of the United States had no application to relator's employment.

[fol. 68] The Home Owners' Loan Act is explicit in limiting the loaning functions of the Corporation to a period which expired on June 13, 1936, last. The Corporation, was therefore intended to be only a temporary agency functioning to aid distressed home owners during an emergency period. Its employees, similarly, were intended to have no status other than that of employees of an interim agency with a definitely limited tenure.

In *Peo., ex rel. Rogers v. Graves*, 57 Supreme Court Reporter, 269, the Court said:

"The power of the federal government to use a corporation as a means to carry into effect the substantive powers granted by the Constitution has never been doubted since *McCulloch v. Maryland*, 4 Wheat 316."

In *Dobbins v. Commissioners of Erie County*, 16 Peters 435, 448, 449; the court held that a state was without author-

ity to tax the instruments, or compensation of persons, which the United States may use and employ as necessary and proper means to execute its sovereign power.

In *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, the court says:

"Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of [fol. 69] the other. * * * Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests in the conviction that each government in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other. * * *

"In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably, has some effect upon the other. * * * Taxation by either the state or the federal government affects in some measure the cost of operation of the other.

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax or the appropriate exercise of the functions of the government affected by it."

The fact that the federal government has the power to undertake such an enterprise as is provided for by the Home Owners' Loan Act and that it is undertaken for what the federal government conceives to be a public benefit does not establish immunity from taxation by the state of the income earned by its employees. (*Helvering v. Powers*,

293 U. S. 214; *South Carolina v. United States*, 199 U. S. 437; *Indian Motorcycle Company v. United States*, 283 U. S. 570-575.)

South Carolina v. United States, 199 U. S. 437 and *Ohio v. Helvering*, 292 U. S. 360, were both cases where the dispensation of liquor had been taken over by an authority created by a state and claimed their exemption from the federal right to tax under the revenue act. The court, while recognizing the power of the state to enter the enterprise, denied the exemption, as the state could not by engaging in a business of that sort, withdraw it from the taxing power which the constitution vested in the national government.

Immunity from taxation can exist only where the taxation is a direct burden laid upon the instrumentality of government; it does not exist where only a remote influence upon the exercise of the functions of government are found. (*Willcuts v. Bunn*, 282 U. S. 216; *Fox Film Corporation v. Doyal*, 286 U. S. 128.)

The business of the Home Owner's Loan Corporation is a business that has always been carried on by private corporations or individuals.

[fol. 71] The tax has been imposed on the income of the relator who is neither an officer or employee of the United States Government, and whose only relation to it is that he has contracted with the Home Owners' Loan Corporation to furnish his services to them.

It cannot be said that the tax imposed upon the relator is imposed upon an agency of government from any technical sense, and the tax itself cannot be deemed to be an interference with government or an impairment of the efficiency of its agency in any substantial way. (*Fidelity & Deposit Company v. Pennsylvania*, 240 U. S. 319; *Railroad Company v. Peniston*, 18 Wall 5; *Gromer v. Standard Dredging Company*, 224 U. S. 362; *Baltimore Ship Building Co. v. Baltimore*, 195 U. S. 375.)

I am not unmindful of the decision in *People of the State of New York ex rel. Rogers v. Graves*, decided on January 4th, 1937, 57 Supreme Court Reporter 269. There was no question in that case but what the building and operation of the Panama Canal were governmental functions and that congress had constitutional power for national defense and to regulate commerce. The court in that case held that the railroad was an auxiliary primarily designed and used to aid in the creation, management and operation of the

Panama Canal and was so closely related to it as to make all of its services a governmental function which the state could not in any way touch by its taxing power.

[fol. 72] The corporation by which the relator was employed was limited as to time and was not a governmental function of such a character as to prevent the state from taxing the income of its employees under its law.

The final determination of the State Tax Commission should be confirmed with costs.

IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION

Pursuant to section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing are true and correct copies of the record on certiorari, as filed with the clerk of the Appellate Division, Third Department, the order of substitution of attorneys for the relator, the notice of appeal, the order appealed from, the decision and dissenting opinion of the Appellate Division annulling the determination of the respondents, the same constituting the complete record now on file with the clerk of the County of Albany; and certification thereof is hereby waived.

Dated, Albany, N. Y., April —, 1938.

John J. Bennett, Jr., Attorney-General, Attorney for
Respondents-Appellants. Daniel McNamara, Jr.,
Attorney for Relator-Respondent.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 73] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 19, 1938

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 478

MARK GRAVES, JOHN J. MERRILL and JOHN
P. HENNESSY as Commissioners constituting the
State Tax Commission of the State of New York,
Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
upon the relation of JAMES B. O'KEEFE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

JOHN J. BENNETT, JR.,
Attorney General, State of New York.

HENRY EPSTEIN,
Solicitor General, State of New York,
Solicitor for Petitioners.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1938.

No.

MARK GRAVES, JOHN J. MERRILL and JOHN
P. HENNESSY, as Commissioners constituting the
State Tax Commission of the State of New York,
Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
upon the relation of JAMES B. O'KEEFE.

**PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF NEW YORK.**

*To the Honorable the Chief Justice and Associate Jus-
tices of the Supreme Court of the United States:*

Your Petitioner, John J. Bennett, Jr., Attorney General of the State of New York, on behalf of Mark Graves, John J. Merrill and John P. Hennessy, as Commissioners constituting the State Tax Commission of the State of New York, respectfully prays for a writ of certiorari herein to review a certain final order and judgment of the Supreme Court of the State

of New York, Albany County, entered and filed Aug. 19, 1938, affirming the final order of the Court of Appeals of the State of New York, being the highest court of said State, in the above entitled proceeding, the opinion and decision of said Court of Appeals having been rendered and filed July 7, 1938, affirming an order of the Appellate Division of the Supreme Court of the State of New York in the Third Judicial Department in said State, entered December 29, 1937, which annulled, on certiorari, a determination of the State Tax Commission denying an application by the taxpayer therein (the above named James B. O'Keefe) for a revision and resettlement or computation of his personal state income tax for the year 1934 and for a refund of the tax paid for that year.

Opinions Below.

The decision of the Court of Appeals of the State of New York is reported in the New York Advance Sheets Number 1962, for August 6, 1938, as page 2210, Volume 278 of New York Reports, with the notation: "Order affirmed with costs on the authority of *People ex rel. Rogers v. Graves*, (299 U. S. 401). No opinion." The order of the Appellate Division in the Third Judicial Department of the State of New York (R. ff. 191-214), was reported in 253 App. Div. (N. Y.) 91, with the memorandum: "Relator is the regularly retained attorney for the Federal Home Owners' Loan Corporation. His salary is not subject to tax under *People ex rel. Rogers v. Graves* (299 U. S. 401)."

A dissenting opinion was filed in the Appellate Division of the Supreme Court by Justice Crapser (R. f. 210), on the ground that:

“The business of the Home Owners’ Loan Corporation is a business that has always been carried on by private corporations or individuals.”

The determination of the State Tax Commission and the opinion of Graves, Commissioner, are also set forth in the record. (R. ff. 22-48.)

Jurisdiction.

The order of the Supreme Court below was entered on August 19, 1938 (R.). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229; 43 Stat. 936; 28 U. S. C. A. Sec. 344:

“Sec. 237 (b). It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exer-

cised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

Question Presented.

Whether the compensation received by the taxpayer for services performed during the year 1934 as an employee of the Home Owners' Loan Corporation is exempt from taxation by the State of New York on the ground that such a tax would be an unconstitutional burden on the Federal Government.

Statutes Involved.

The pertinent statutory provisions involved will be found in the appendix *infra*, pages 34 to 52. They are Section 359 of the Tax Law of New York State; and Chapter 64, 48 U. S. Stat. at Large, 128, being the Home Owners' Loan Act of 1933.

Statement.

The taxpayer, a resident of New York during the year 1934, was employed as an examining attorney (R. f. 64) by said Home Owners' Loan Corporation

and started work on January 12th, 1934, at a compensation of \$80.00 per month (R. f. 66). His duties as examining attorney included the reading of titles, *i. e.*, the examination of certificates sent in by Title Companies before sending the file to the closing attorney (R. ff. 68, 69), to see if there were any defects in title, to examine the certificates of title after the return of the file by the closing attorney prior to the loan closing, and various similar legal services (R. ff. 31, 32, 126, 127).

He duly made a personal income tax return pursuant to the Tax Law of the State of New York and paid an income tax of \$57.28 for the year 1934. Thereafter, on August 16, 1935 (Stip. R. ff. 170, 171) he made application, pursuant to Section 374 of the Tax Law, for a refund of the foregoing tax upon the grounds that his salary from the Home Owners' Loan Corporation in the sum of \$2246.66 (R. ff. 29, 71, 83; Stip. R. f. 169) was earned by him as an employee of the Federal Government engaged in the performance of a governmental function and therefore was exempt from New York State Income Tax. He was paid semi-monthly by check of the Home Owners' Loan Corporation, signed by the Treasurer of the Home Owners' Loan Corporation, drawn on the Treasury of the United States (R. ff. 77, 105).

Under the statutory authority of Section 4, Subdivision (j) of the Home Owners' Loan Act of 1933 (June 13, 1933, Chap. 64, 48 U. S. Stat. at Large, 128; U. S. Code, Tit. 12, Sections 1461-1468), Mr. O'Keefe

received a verbal appointment as attorney (R. f. 73) from the Home Loan Bank Board through its Metropolitan District Council (R. f. 72), without competitive civil service examination (R. ff. 74, 128). By this statute the Corporation had power to employ such officers and employees without regard to provisions of law applicable to the employment or compensation of officers, employees, attorneys or agents of the United States. U. S. Code, Tit. 12, sec. 1463 (j).

The law creating the Home Owners' Loan Corporation as amended is entitled "Home Owners' Loan Act of 1933". It provides in Section 4-(a) thereof that the Federal Home Loan Bank Board (created by Congress under the Federal Home Loan Bank Act) was authorized to create a corporation to be known as the Home Owners' Loan Corporation (R. f. 34) and when created became a distinct entity (R. f. 4).

The Home Owners' Loan Corporation was empowered to issue bonds in an aggregate amount not to exceed \$4,750,000,000 and stocks to be sold to the public by the corporation to obtain funds for carrying out the purposes of the Section (R. ff. 37, 41). The bonds were to be fully and unconditionally guaranteed both as to principal and interest by the United States (R. f. 37).

Among the other purposes for which the corporation was organized were the following:

(a) For a period of three years after the date of the enactment of the Act

(1) To acquire in exchange for bonds issued by it, home mortgages and other obliga-

tions and liens secured by real estate recorded or filed or executed prior to the date of the enactment of the law and

(2) In connection with any such exchange to make advances in cash to pay the taxes and assessments on the real estate, to provide for necessary maintenance and make necessary repairs, to meet the incidental expenses of the transaction and

(b) For a period of three years from the date of the enactment of the Act to make loans in cash in cases where property is not otherwise encumbered, but in no case should such loan exceed fifty per centum of the value of the property securing the same; such loan to be secured by duly recorded home mortgage bearing interest and

(c) In a case where the holder of a home mortgage or other obligation or lien eligible for exchange for the corporation bonds does not accept such bonds in exchange, to make cash advances to such home owner in an amount not to exceed forty per centum of the value of the property (R. ff. 38-40).

The operations of the Home Owners' Loan Corporation are now carried out in each of the forty-eight states by separate state organizations (R. f. 94). Over the state offices there is a Regional Office; each Regional Office supervising state offices of several states. The Regional Office has nothing to do with the approval or disapproval of loans. The state office is a complete functioning office (R. f. 99).

The Corporation refunds, refinances and loans monies on mortgages at interest rates of five (5%) per centum and six (6%) per centum per annum (R. ff. 107, 134-135) on properties upon which are built homes for

not more than four families and having a value of not more than Twenty-five Thousand (\$25,000) Dollars (R. ff. 107-108). The rate of interest is so fixed that the difference between the rate charged and the rate paid on account of the bonds is to pay for the operating costs of the corporation (R. f. 132). Congress has the power to reduce the rate of interest if the Corporation shows profit (R. f. 135). It makes advances to home owners for repairs under the supervision of a Reconditioning Division of the Home Owners' Loan Corporation (R. ff. 92, 111, 112-113, 143-144) and for additions to houses or for new heating systems upon those premises on which the Home Owners' Loan Corporation has a mortgage or is about to refund an existing mortgage (R. ff. 113-115). In return for the advances, the Home Owners' Loan Corporation takes back a mortgage or other obligation from the owner (R. ff. 114-115). Loans are made up to eighty (80%) per centum of the Corporation's appraised value of the property, the maximum loan being Fourteen Thousand (\$14,000) Dollars (R. f. 122). The corporation also pays real estate taxes on property actually owned by itself (R. f. 101).

The Home Owners' Loan Corporation work is carried on by full time salaried employees and also by fee personnel who are paid a certain amount per case. Outside experts are retained to appraise property and to appraise the cost of reconditioning or repairing. Title closings are handled by outside attorneys on a fee basis. Title searches are made for the Corporation by title or abstract companies or by outside fee attorneys (R. ff. 124-125).

Specifications of Errors to be Urged.

The Court of Appeals erred :

1. In holding that the taxpayer was an official or employee of the United States.

2. In failing to hold that the functions of the Home Owners' Loan Corporation were not essential to the preservation of the Government of the United States and that, consequently, the salary received by the taxpayer was not immune from taxation by the State of New York.

3. In failing to hold (within the rulings of this Court in *Helvering v. Gerhardt*, 82 Law Ed. Adv. Ops. 962) that the burden of the tax in question on the Government of the United States was speculative and uncertain and that, consequently, the salary received by the taxpayer was not immune from taxation by the State of New York.

4. In failing to hold (within the rulings of this Court in *Helvering v. Gerhardt*) that the tax in question would be substantially or entirely absorbed by a private person and that, consequently, the salary received by the taxpayer was not immune from taxation by the State of New York.

5. In holding that the functions exercised by the Home Owners' Loan Corporation during the year in question were governmental functions of the United States.

6. In failing to hold that the Home Owners' Loan Corporation was performing proprietary functions.

7. In failing to hold that the law creating the Home Owners' Loan Corporation is unconstitutional.

8. In holding, if the decision can be so construed, that the compensation received by the taxpayer for services rendered during the year 1934 as an employee of the Home Owners' Loan Corporation was exempt by statute from the income tax of the State of New York.

9. In holding, if the decision can be so construed, that said compensation received by the taxpayer as aforesaid, was constitutionally immune from the income tax of the State of New York.

10. In affirming the decision of the Appellate Division of the Supreme Court in the Third Judicial Department of the State of New York.

Reasons for Granting the Writ.

A decision by this Court is necessary to determine whether or not salaries, wages, and other compensation received by employees of the Home Owners' Loan Corporation and other similar corporations of the Federal Government are taxable under the New York State Income Tax Law. This question of constitutional law is one of first and pressing importance in many States.

The questions which require decision are: (1) whether the Courts below should not have found the employee taxable by the State of New York under the

recent decision of this Court in *Helvering v. Gerhardt*, 82 Law Ed. Adv. Ops. 962; (2) whether the Court below was in error in following the decision of this Court in *New York ex rel. Rogers v. Graves*, rather than the more recent principles of intergovernmental immunity enunciated in *Helvering v. Gerhardt, supra*, within the meaning of that case; (3) whether or not the burden on the Federal Government of a state tax on the salary of an employee of the Home Owners' Loan Corporation would not be so speculative and uncertain, and so substantially absorbed by a private person, as not to be prohibited by the limitations on the doctrine of implied immunity; (4) whether the activities of the Home Owners' Loan Corporation are essential to the preservation of the Federal Government; (5) whether or not the activities of the Home Owners' Loan Corporation were proprietary, rather than governmental; (6) whether the taxpayer herein who claims immunity from the common burdens of taxation which rest equally upon all, brings himself clearly within the statutory exemptions and the language relied upon therein as creating such exemptions; and (7) whether the salary, wages or compensation of an employee of certain Federal instrumentalities is immune from a state income tax when the Congress has clearly undertaken the task of expressly declaring exemptions from state taxation and in so doing has omitted income taxation from its enumerated exemptions.¹

¹The State of New York appeared as amicus curiae in *Helvering v. Gerhardt*, 82 Law Ed. Adv. Ops. 962 and submitted certain arguments concededly inconsistent with certain of those herein expressed. While still adhering to the arguments made in that case, at least during the pendency of a petition for a re-hearing therein, the state proceeds here upon the provisional assumption that the Gerhardt opinion expresses the law as it now stands on those points and that it has disposed of the state's original contentions in that case. Other arguments for review herein are, of course, not dependent on the Gerhardt decision.

WHEREFORE, your petitioners pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the Supreme Court of the State of New York to review the determination of the Court of Appeals, the court of last resort of the State of New York, as provided by law, and that your petitioners have such other and further relief as may be deemed appropriate. A certified copy of the record in the courts below is submitted herewith, together with the remittitur of the Court of Appeals, in support hereof.

Dated, October 24th, 1938.

Respectfully submitted,

MARK GRAVES, JOHN J. MERRILL and JOHN
P. HENNESSY, constituting the State Tax
Commission of the State of New York,
Petitioners,

By—

JOHN J. BENNETT, JR.,
Attorney General, State of New York,

HENRY EPSTEIN,
Solicitor General, State of New York,
Solicitor for Petitioners.

ARGUMENT IN SUPPORT OF PETITION.

I.

Under the Rule of *Helvering v. Gerhardt*, the Respondent Is Clearly Taxable by the State of New York.

The Courts below rested their decision solely upon *New York ex rel. Rogers v. Graves*, 299 U. S. 401.

We submit, however, if *Helvering v. Gerhardt*, 82 Law. Ed. Adv. Ops. 962, is to stand unreversed, it enunciated entirely new rules in these cases of inter-governmental immunity as applied to employees. It eliminates the old test of whether or not the activity in question was governmental or proprietary. That test was determinative of the Courts' decision in the *Rogers* case. The unanimous opinion of the Court in that case is devoted solely to the inquiry whether the functions of the Panama Rail Road Company were governmental or proprietary. Thus we find (299 U. S. 401, 404):

"In order to reach a correct determination of the question whether the railroad company is exercising functions of a governmental character, the railroad and ships are to be considered not as things apart, but in their relation to the Panama Canal; * * *."

The Court, in order to answer this question, felt called upon to determine the answer to the further question:

"* * * whether the canal is such an instrumentality of the federal government as to be immune from state taxation; and, if so, are the operations of the railroad company so connected with the canal as to confer upon the company a like immunity?"

And again (page 407-408):

"We attach no importance to the fact that the railroad company has utilized both its ships and railroad to carry private freight and passengers. The record shows that this is done to a limited extent compared with the government business; and that it is only incidental to the governmental operations. The primary purpose of the enterprise being legitimately governmental, its incidental use for private purposes affords no ground for objection.¹ *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 73; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 333.
• • •"

It is quite clear, therefore, that this case was decided by the Courts below solely on the basis of a rule of constitutional law, as formulated by this Court prior to the *Gerhardt* case, that the salary of a state or federal employee was immune on the sole showing that he was engaged in the performance of a governmental function.

The necessity of such an inquiry in the case of public employees appears to have been abandoned in the *Gerhardt* opinion. The decisions of the Court below should therefore be reversed.

The fundamental change in the rule of immunity evidenced by the *Gerhardt* decision, becomes clear upon

¹The Court in summing up the reason for its opinion (p. 408) said:
"The rule is well established; and the reasons upon which it is based and the authorities sustaining it have been so recently reviewed by this court, *Indian Motorcycle Co. v. United States*, 283 U. S. 570, that further discussion is unnecessary."

When we turn to page 575 of the *Indian Motorcycle* case, we find the distinction between governmental and proprietary functions with respect to the taxation of both federal or state employees is emphasized in the statement of the rule:

"It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the states, and that the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them are equally exempt from taxation by the United States."
(*Italics ours.*)

examination of the arguments and opinion in that case. The Attorney General of the United States admitted that under the then existing rule the employees of the Port Authority must be held immune if they were engaged in the performance of a governmental function. (*Helvering v. Gerhardt* and related cases, October Term, 1937, Nos. 779-781; Brief for Petitioner, pp. 30, 31.)¹

On the other hand, the respondent's brief and argument in the *Gerhardt* case were confined to the contention that the activities of the Port Authority were in fact governmental. Both sides, therefore, rested their case on the determination of that question.

The Court, however, found it unnecessary to decide it. Instead, a new rule was announced. The new rule questioned the entire basis of employee implied immunity, as that doctrine had theretofore been formulated. In its place, the Court stated two new guiding principles. First, that implied immunity would not be recognized where the function was not essential to the preservation of the government. The second new principle would, we submit, appear to end all employee immunity—for it declares that the burden of a tax on employees is speculative and uncertain, and that even though a function might be important enough to demand the immunity for the government itself, a tax on its employees is "substantially or entirely absorbed by private persons."²

¹See also Transcript of Argument of Assistant Solicitor General, pages 8, 32.

²It may still be argued upon the proper showing of facts that in a given case the burden is not speculative and uncertain "or substantially absorbed by a private person". But in this case the record corresponds in all respects with that in the *Gerhardt* case on this point.

The applicability of the first of these rules will be developed in our subsequent Reasons. We need only state here, as a comment obviously so well founded that it should hardly require extended development—that, if there is any function which is not “essential to the preservation” of the Federal Government, it is the banking, mortgage and real estate business of the Home Owners’ Loan Corporation.

Here we are primarily concerned with the second principle, that the burden of a tax on employees is so speculative and uncertain and has only a remote, if any, influence upon the exercise of functions of government, that it does not give rise to immunity. Such a principle would seem to be quite clear in its consequences. It simply abolishes the former rule of employee immunity.¹

¹This would appear to be the view of the Attorney General of the United States, for in a Study made by the Department of Justice at the direction of the Attorney General himself, entitled “Taxation of Government Bondholders and Employees”, and forwarded to the Treasury Department on June 24, 1933, the Attorney General says (pages 87 to 71):

“Finally, the doctrine of tax immunity of state employees appears largely if not entirely to have been swept away on May 23, 1932, by the decision in *Helvering v. Gerhardt*. . . . The opinion, by Mr. Justice Stone, proceeded on a broad front. . . . Earlier cases were distinguished. . . .

“The *Gerhardt* case seems probably to settle that the state or municipal employee is subject to federal taxation. The entire discussion in the opinion, apart from the introductory statement of facts, contains only one reference to the fact that the taxpayers were employed not by the state but by The Port of New York Authority. . . . The affirmative reasoning of the Court is directed entirely to state employees generally. It seems, therefore, a reasonably safe prediction that all salaries paid to employees of state and local governments, . . . may be subjected to the federal income tax. . . .

“It is probable that the care with which the opinion distinguishes the officer from the employee is due to a desire to escape the necessity of reexamining *Collector v. Day*, rather than to approval of its result. . . .

“Since the Court seemed studiously to refrain from approving *Collector v. Day*, and since every reason which it advanced to sustain taxation of the state employee is equally applicable to the state officer, it is at the least a reasonable conclusion that the Court viewed the federal taxing power as reaching to officers as well as to employees of the states.

“Finally, the analysis of the present authority of *Pollock v. Farmers’ Loan & Trust Co.* is fully applicable to *Collector v. Day*. Every reason which the Court has articulated for declaring invalid a nondiscriminatory tax on a private person who deals with the government seems to have been abandoned or contradicted by subsequent decisions: . . .

“It seems, therefore, to be more probable than not that the federal income tax may be applied to the salary received from a state or municipal government, whether the taxpayer serve as an employee or as an officer.”

In the case of *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 580 (1930) Justice Stone in a dissenting opinion, with Justice Brandeis concurring, said:

"The implied immunity of one government, either national or state, from taxation by the other should not be enlarged. Immunity of the one necessarily involves curtailment of the other's sovereign power to tax. The practical effect of enlargement is commonly to relieve individuals from a tax, at the expense of the government imposing it, without substantial benefit to the government for whose theoretical advantage the immunity was invoked.

"* * * it is not clear how a recovery by a taxpayer would benefit directly the government supposed to be burdened; and the assumption of individual benefit in the case of a tax of this type necessarily rests upon speculation rather than reality."

If the burden of a tax on an employee's salary is speculative and uncertain, it is equally so whether the taxpayer be an employee of the state or the federal government. The quality of the relationship is precisely the same in either case. In both cases human beings serve as the instruments of government. In both cases there is the same contract to devote human brains and human hands to the performance of a service for an agreed salary. In both cases the employees receive the benefits and protection extended by the other government which seeks to impose the tax.¹ In both cases the salary may be considered to have been diminished by the tax.

¹See *Helvering v. Gerhardt*,

U. S.

; 82 Law. Ed. Adv. Ops. 962.

But how can it conceivably be contended that in the case of a state employee the resultant burden on the state is "speculative and uncertain," whereas in the case of the federal employee the burden would be "definite and certain?" How can it be contended, with any semblance of plausibility, that the federal tax is "substantially or entirely absorbed by private persons," but that a similar state tax would have to be absorbed by the Federal Government itself? And, when in all cases the question is simply one of a tax on a salary, how can it be contended that a "speculative" effect of the burden differs with the function?

Why is a tax on the salary of a President, a Judge, or a Governor any less speculative than a tax on the salary of a policeman, a port employee, or a federal clerk?

These are questions which we submit should commend this Court's review of the decision below. They demonstrate that the rule of the *Rogers* case, relied on by the Courts below, should not have been accepted as persuasive. On the contrary, the applicability of the principles now established by the *Gerhardt* case, would have held the salary of the respondent taxable by the State of New York.

The respondent will, no doubt, reply that all of the Court's reasoning in the *Gerhardt* case should be jettisoned when the state attempts to tax the salary of a federal employee. On the contrary, we question whether the dicta in the Court's opinion in the

Gerhardt case, with reference to federal employees, justifies any such distinction. Prior decisions of the Court would seem to negative any intention to abandon the reciprocal character of the rule of immunity. And in any event such a claim raises a serious question of constitutional law which this Court ought now to decide.

In a long series of cases the immunity rule has been expressly held to be reciprocal as between state and federal governments.

- Collector v. Day*, 11 Wall. 113, 127 (1817);
Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 584 (1895);
Ambrosini v. United States, 187 U. S. 1, 7 (1902);
South Carolina v. United States, 199 U. S. 437, 451, 452 (1905);
Metcalf & Eddy v. Mitchell, 269 U. S. 514, 521 (1926);
Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 400 (1932);
Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466, 471 (1934).

As the Supreme Court has recently expressed it in *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 579 (1930):

“Under the constitutional principle the exertion of such a function by a state or a state agency has the same immunity from Federal taxation that like exertions by the United States or its agencies have from state taxation.”

In all of the foregoing cases, and particularly at the pages noted, the Court has emphasized the constitutional necessity that the rule of immunity be applied reciprocally. The logic of that conclusion would seem inescapable if the dual sovereignty of state and federal governments is to be preserved. If taxation is incompatible with sovereignty, no distinction can be drawn between the two divisions of government in America, the one recognized and preserved, the other created by the Constitution.

It is certainly no answer to say that the states are represented in Congress. We are dealing with a question of the reserved sovereignty of the states. Representation in Congress has nothing whatsoever to do with such a question. It seems elementary to have to state that the reserved rights of the states can only be overthrown by constitutional amendment, and not by the action of their representatives in Congress.

If representation in Congress may ever be interposed as an answer to the complaint based upon the sovereignty of the states, it should be obvious that the last remnants of independence will then have been stripped from the states. Under the Constitution their sovereignty *may* be impaired with the acquiescence of three-fourths of the states—but *not* by a congressional majority. The question is one of constitutional right and not one of dubious political protection.

We also petition for certiorari in order that the state may place before this Court its contention that

the mere power of Congress to create such instrumentalities does not of itself give rise to a federal immunity.

The state also seeks an opportunity to present to the Court its contention that even if the employees of the Home Owners' Loan Corporation would enjoy an implied immunity, that such an immunity has been waived by Congress' failure to include the employees of the Corporation among the subjects expressly declared exempt in Section 1463 (c) of the Act.

In the case of *Baltimore National Bank v. State Tax Commission* of Maryland, 297 U. S. 209, the Court decided against the Petitioner's contention that the following section in the Reconstruction Finance Corporation Act,

"The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation . . . except that any real property of the Corporation shall be subject to . . . taxation to the same extent according to its value as other real property is taxed. 47 Stat. at L. 5, 9, 10; chap. 8, U. S. C. A. title 15, section 610,"

provided for an exemption from state taxation of shares in a national bank wholly subscribed and owned by the Reconstruction Finance Corporation. The Petitioner insisted that the tax in controversy was impliedly forbidden by that section. The Court, at page 214, stated:

"The contention is plausible, yet it will not prevail against analysis. For the tax now in controversy whatever its indirect effect, is not laid

directly upon the capital, reserves, or surplus of the corporation claiming the immunity or accorded the exemption."

The Court therefore refused to agree with the Petitioner's contention that this Congressional declaration of immunity covered taxation of national banks' shares.

The Home Owners' Loan Corporation Act, section 1463 (c), has a like provision, as follows:

"The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, state, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. *The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed.*" (Italics ours.)

It is this Petitioner's contention, therefore, that Congress intended to declare immune from state taxation only those subject matters stated in the Home Owners' Loan Act as above set forth. Congress has clearly undertaken the task of expressly declaring what subject matters are exempt from state taxation and in so doing has omitted income taxation of the Corporation's employees from its enumerated exemptions. The authority of the *Baltimore National Bank case* is binding upon the employee herein in answer to

any proposition urged by him with respect to the possible Congressional implied immunity under the Home Owners' Loan Act.

If such considerations of the entrance of government into new fields of activities never dreamed of when the Constitution was adopted, were found by this Court to be a persuasive argument against the states in *Helvering v. Gerhardt*, they should be given similar weight when the states seek to impose a tax on an employee of the Federal Government whose functions in the field of private banking and real estate have always been taxable by the states. Indeed, there is a graver reason for protection of the states than of the Federal Government. The immunity of a state activity can, at most, be deemed to interfere with the power of the Federal Government to raise revenue. But with the vast powers and resources of the central government, the power to tax the states is the most direct road to federal control and to the ultimate centralization of our government.¹

The doctrine of tax immunity is a necessary development of our dual system of state and federal government. It must be given a practical construction which permits both governments to function with the minimum of interference each with the other. Limitations

¹In this connection the extent to which the Attorney General of the United States hopes to carry the *Gerhardt* decision, is rather alarmingly indicated by his recent statement in an official document, that

"For on May 23, 1935, the Court in *Helvering v. Gerhardt* seems to have rejected the reciprocal test of tax immunity and returned to Chief Justice Marshall's understanding that the principle of immunity protected the federal government against taxation by the states but did not necessarily shield the states against the exercise of the delegated, and supreme, taxing power of the central government." (Boldface ours.) "Taxation of Government Bondholders and Employees," *supra*, pp. 9-10.

cannot be so varied or extended as seriously to impair the taxing power of the government imposing the tax or the appropriate exercise of the functions of government affected by it.

The state and national governments must co-exist. Each must be supported by taxation of those who are citizens of both. The fact that the economic burden of taxes may be passed on to the other government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity. Such burdens are but normal incidents of the organization within the same territory of two governments, each possessed of the taxing power.

II

The Activities of the Home Owners' Loan Corporation are not Essential to the Preservation of the Federal Government.

As appears from the foregoing statement (*supra*, page 15), the Home Owners' Loan Corporation was created by the Federal Home Loan Bank Board, as a distinct and independent corporate entity. It issued its own stock and sold bonds to the public. Its operations were conducted by its own board of directors. By statute, the provisions of law applicable to officers and employees of the United States had no application to the employment of the taxpayer. The Home Owners' Loan Corporation was created as a temporary agency to aid distressed owners during a period of

economic depression. However praiseworthy those motives, it may be questioned whether the Federal Government has the constitutional power to undertake such an enterprise. In any event, it is obvious, particularly in view of the absence of any power in the Federal Government to make private loans on mortgage security, to undertake the repair of private houses or to go into the real estate business on a huge scale, that such functions are not, within the test prescribed in the *Gerhardt* case, essential to the preservation of the Federal Government. The mere fact that its activities are performed for what the Federal Government conceives to be a public benefit does not establish the immunity of the corporation's employees. See *People ex rel. Rogers v. Graves*, 299 U. S. 401, citing therein *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 575, *et seq.* and the authorities therein referred to.

The entire reasoning of this Court in the *South Carolina* and the *Powers* cases¹ makes it clear that neither the state nor the Federal Government may engage in a traditionally private business, such as the real estate and mortgage business here involved, and by so doing withdraw that business from the taxing power of the other government. Clearly, the business in which the Home Owners' Loan Corporation is engaged in the State of New York was previously a source of large tax revenues to the State of New York. If the Federal Government is not free to tax proprietary activities of the states, but can also deprive the state of such sources of revenue, and if it can come

¹*South Carolina v. United States*, 199 U. S. 437; *Helvering v. Powers*, 293 U. S. 214.

into a state, as it has done throughout the Tennessee Valley, and erect huge power plants, distributing systems, and engage in the wholesale and retail distribution and sale of electric power and other businesses formerly carried on by private utilities, the states can rapidly be reduced to pauperized geographical divisions of a central government and be dependent for their continued existence upon its charity or bounty.

As was pointed out by the two dissenting Justices in the Appellate Division below:

"The business of the Home Owners' Loan Corporation is a business that has always been carried on by private corporations or individuals.

"The tax has been imposed on the income of the relator who is neither an officer nor an employee of the United States Government, and whose only relation to it is that he has contracted with the Home Owners' Loan Corporation to furnish his services to them.

"It cannot be said that the tax imposed upon the relator is imposed upon an agency of government from any technical sense, and the tax itself cannot be deemed to be an interference with government or an impairment of the efficiency of its agency in any substantial way. (*Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319, *Railroad Co. v. Peniston*, 18 Wall. 5; *Gromer v. Standard Dredging Co.*, 224 U. S. 362; *Baltimore Ship Building Co. v. Baltimore*, 195 *id.* 375.)" *People ex rel. O'Keefe v. Graves*, *supra*, p. 95.

That the tax in the instant case is not a tax on the corporation—the instrumentality itself—is evident. It does not cast a direct burden on the corporation's operations within the requirements of the *Gerhardt*

case. The tax, if it in fact affects the operations of the corporation, could do so only remotely and would not constitute an interference with a federal instrumentality or be an encroachment upon the sovereignty and supremacy of the Federal Government.

III.

The Activities of the Home Owners' Loan Corporation are Proprietary.

The Home Owners' Loan Corporation is engaged in no activity which can be declared to be other than proprietary. An analysis of its powers and purposes forces one to the conclusion that the Corporation performs no governmental function.

All of the capital stock of the Corporation is subscribed for by the Secretary of the Treasury on behalf of the United States, U. S. C. A. Tit. 12, Sec. 1463 (b). Surplus or accumulated funds are to be paid into the Treasury of the United States. Tit. 12, section 1463 (k). The purpose for which the Corporation was created was to provide emergency relief with respect to mortgage indebtedness upon homes, Tit. 12, section 1463 (g); to refinance mortgaged properties, Tit. 12, section 1463 (f); and to acquire in exchange for bonds issued by it, home mortgages and other obligations or liens secured by real estate and to make advances in cash to pay taxes and assessments, Tit. 12, section 1463 (d).

These purposes and activities of the Home Owners' Loan Corporation seem to the Petitioner to be clearly proprietary in character. *Helvering v. Powers*, 293 U. S. 214. In the conduct of its business it may enter into contracts with individuals, firms, or corporation in a like manner as any private lending institution. All of the above enumerated characteristics are characteristics of any ordinary mortgage loan corporation.

The Petitioner urges that this case demands the application of the principle announced by this Court that the doctrine of intergovernmental tax immunity is not to be applied in a manner so as to cripple the taxing power of the other sovereignty. *Willcuts v. Bunn*, 282 U. S. 216, 225; *James v. Dravo Contracting Co.*, 302 U. S. 134. The Court should not deprive the State of New York of a source of revenue because the Federal Government has engaged in activities which are proprietary and which would produce revenues had the activities been carried on by private institutions.

IV.

Respondent was neither an Officer nor an Employee of the United States, nor did he receive his Salary from the United States.

The respondent cannot establish exemption under Section 359, Paragraph 2-f of Article 16 of the Tax Law of the State of New York. That section excludes from gross income:

“Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States.”

The respondent is not an employee of the United States. The Home Owners' Loan Corporation is merely a corporate creation of the Federal Home Loan Bank Board. The taxpayer was appointed by an officer of that corporation and became its employee. The corporation was an entity distinct from the United States and from any of its departments.

In this connection it is significant that both the Court of Appeals and the Appellate Division rested their decisions below, not upon the foregoing statute, but upon the arguments for constitutional immunity as they were formerly set forth by this Court in *People ex rel. Rogers v. Graves*, 299 U. S. 401. The opinion of this Court in that case nowhere makes any claim for the statutory exemption of Mr. Rogers, General Counsel of the Panama Rail Road Company, as an officer or employee of the United States, although by Point IV of his Brief, the Appellant, Rogers, stated that while he was not a direct employee of the United States Government, it seemed to him that he fell within the exception from state taxation of “salaries, wages and other compensations received from the United States of officials or employees thereof.” (Sec. 359-f, New York Tax Law.)

In the case of *Pomeroy v. State Board of Equalization of Montana*, 45 P. (2d) 316 (Mont.): the taxation

of the income of a citizen-resident taxpayer of that State who was an employee of the Reconstruction Finance Corporation, was upheld. Section 7 of Chapter 181, Laws of Montana, 1933—Montana Income Tax Law—declares that:

“The term ‘gross income’— * * * (2) * * * does not include the following items * * * (f) salaries, wages and other compensations received from the United States or officials or employees thereof, including persons in the military or naval forces of the United States.”

The Court stated that the word “or” after the words “United States” was a typographical error and should be “of,” basing this finding on the fact that the Montana statute was probably copied from the New York Act or the “model” act drafted in 1921 for the National Tax Association.

The Court pointed that the Reconstruction Finance Corporation was similar to the Inland Waterways Corporation, United States Shipping Board Emergency Fleet Corporation, and Federal Intermediate Credit Banks. Citing the authority of *United States v. Walter*, 263 U. S. 15; 44 S. Ct. 10, 11; 68 L. ed. 137, wherein this Court held that the Fleet Corporation, although an instrumentality of the Government exercising governmental functions, was a private corporation “government owned” whose employees are not agents of the government, the Reconstruction Finance Corporation employee was deemed to be in a similar category and not entitled to the exemption under Section 7 of the Montana Income Tax Law.

In the recent case of *Parker v. Mississippi State Tax Commissioner*, 178 Miss. 680; 170 So. 567, the salary

of the Vice-President of a Federal land bank was held not to be exempt from state income tax. In considering the question of tax exemption, the Court said (page 684):

“• • • the principle should be kept in mind that exemptions from taxation will not be presumed; the burden is on the claimant to establish clearly his right; the statute is strictly construed against the claim. (Citing authorities.)”

The taxpayer applied for a writ of certiorari to this Honorable Court. The certiorari was denied 302 U. S. 742; 82 Law. Ed. Adv. Ops. 105. It is to be noted that the taxpayer's petition set forth Laws of Mississippi, 1934, Chapter 120, Section 7 (6), providing that “gross income” shall not include

“salaries, wages and other compensations received from the United States Government or officials or employees thereof, including persons in the military or naval forces of the United States.”

The petitioner did not rely upon this statute and frankly stated that this provision did not bear on the issues in the case but was incorporated only because it was referred to in the defendant's demurrer in the state Court.

We respectfully submit, therefore, that under the authorities given, the taxpayer is not in receipt of a salary from the United States as an officer or employee so as to come within Section 359, Subdivision 2 (f) of the New York Tax Law.

Conclusion.

We feel that it is desirable, in view of the vital implications of the instant case, that this Honorable Court determine once and for all the taxability of the salaries of employees of the Home Owners' Loan Corporation and similar governmental agencies. Every tax, irrespective of its nature, cannot be said seriously to interfere with the primary purpose for which an instrumentality is created. The Home Owners' Loan Corporation presents only one of a constantly mounting number of new operations which have come to be regarded as having some relationship to government. Although it may be of the greatest social and economic wisdom to create agencies of this type, it must be obvious to the most casual observer that, if the immunity of an employee of the Home Owners' Loan Corporation and similar agencies is upheld, the states will lose substantial revenues.

If the taxation of this employee represents an interference with a federal agency, the interference is certainly too remote to warrant an application of the immunity which the taxpayer attempts to derive from the sovereign nature of the Federal Government.

Above all, we submit that only through the traditional reciprocity as between the states and the Federal Government can the constitutional purpose of "an indestructible union of indestructible states" be fulfilled. We are confident that this Court will extend to the states as well as to the Federal Government, an equal protection of its sovereign rights and immunities.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

October 25, 1938.

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APPENDIX A.

TAX LAW, NEW YORK STATE—CHAPT. 60 OF
THE CONSOLIDATED LAWS OF NEW YORK
STATE.

“§359. GROSS INCOME DEFINED.

The term ‘gross income’:

1. Includes gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, and whether situated within or without the state, growing out of the ownership or use of or interest in such property; also from interest, rent (including rent derived from real property situated outside the state), dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, including gains or profits or income derived through estates or trusts by the beneficiaries thereof, whether as distributed or as distributable shares, it being intended to include all of the foregoing items, without regard to the source thereof, location of the property involved, or any other factor, except only a case where the inclusion thereof would be violative of constitutional restrictions. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the methods of accounting permitted in this article, any such amounts are to be properly accounted for as of a different period; but

2. Does not include the following items which shall be exempt from taxation under this article:

f. Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States. * * *.”

APPENDIX B.

U. S. C. A.—TITLE 12—BANKS AND BANKING.

§1461. Short title.

This chapter may be cited as the "Home Owners' Loan Act of 1933." (June 13, 1933, c. 64, §1, 48 Stat. 128.)

§1462. Definitions.

As used in this chapter—

(a) The term "Board" means the Federal Home Loan Bank Board created under Chapter 11 of this title.

(b) The term "Corporation" means the Home Owners' Loan Corporation created under section 1463 of this chapter.

(c) The term "home mortgage" means a first mortgage on real estate in fee simple or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable, or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed, upon which there is located a dwelling or dwellings for not more than four families, which is used in whole or in part by the owner as a home or held by him as his homestead, and which has a value of not to exceed \$20,000; and the term "first mortgage" includes such classes of first liens as are commonly given to secure advances on real estate under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby.

(d) The term "association" means a Federal Savings and Loan Association chartered by the Board as provided in section 1464 of this chapter. (June 13, 1933, c. 64, §2, 48 Stat. 128; June 27, 1934, c. 847, §508 (a), 48 Stat. 1264; May 28, 1935, c. 150, §10, 49 Stat. 296.)

§1463. Home Owners' Loan Corporation.

(a) *Creation; directors.* The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such bylaws, rules and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the Board of Directors of the Corporation and shall serve as such directors without additional compensation.

(b) *Capital stock; subscription by United States; allocation of funds by Reconstruction Finance Corporation.* The Board shall determine the minimum amount of capital stock of the Corporation and is authorized to increase such capital stock from time to time in such amounts as may be necessary, but not to exceed in the aggregate \$200,000,000. Such stock shall be subscribed for by the Secretary of the Treasury on behalf of the United States, and payments for such subscription shall be subject to call in whole or in part by the Board and shall be made at such time or times as the Secretary of the Treasury deems advisable. The Corporation shall issue to the Secretary of the Treasury receipts for payments by him for or on account of such stock, and such receipts shall be evidence of the stock ownership of the United States. In order to enable the Secretary of the Treasury to make such payments when called, the Reconstruction Finance Corporation is authorized and directed to allocate and make available to the Secretary of the Treasury the sum of \$200,000,000, or so much thereof as may be necessary, and for such purpose the amount of the notes, bonds, debentures, or other such obligations which the Reconstruction Finance Corporation is authorized and empowered under section 609 of Title 15, to have outstanding at any one time, is hereby increased by such amounts as may be necessary.

(c) *Bond issue by corporation authorized; interest and principal guaranteed by United States; exemption from taxation.* In order to provide for applications filed before May 28, 1935, for applications filed within thirty days thereafter, and for carrying out the other purposes of this section, the Corporation is authorized to issue bonds in an aggregate amount not to exceed \$4,750,000,000, which may be exchanged as hereinafter provided, or which may be sold by the Corporation to obtain funds for carrying out the purposes of this section or for the redemption of any of its outstanding bonds; and the Corporation is further authorized to increase its total bond issue for the purpose of retiring its outstanding bonds by an amount equal to the amount of the bonds to be so retired (except bonds retired from payments of principal on loans), such retirement to be at maturity or by call or purchase or exchange or any method prescribed by the Board with the approval of the Secretary of the Treasury: *Provided*, That no bonds issued under this subsection, as amended, shall have a maturity date later than 1952. Such bonds shall be in such forms and denominations, shall mature within such periods of not more than eighteen years from the date of their issue, shall bear such rates of interest not exceeding 4 per centum per annum, shall be subject to such terms and conditions, and shall be issued in such manner and sold at such prices, as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation shall be unable to pay upon demand, when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof which is hereby authorized to be appropriated out of any moneys in the Treasury

not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds of the Corporation issued under this subsection which are guaranteed as to interest and principal, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under Sections 752, 753 and 757 of Title 31, and the purposes for which securities may be issued under such sections are extended to include any purchases of the Corporation's bonds hereunder. The Secretary of the Treasury may, at any time, sell any of the bonds of the Corporation acquired by him under this subsection. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any state, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed. No such bonds shall be issued in excess of the assets of the Corporation, including the assets to be obtained from the proceeds of such bonds, but a failure to comply with this provision shall not invalidate the bonds or the guaranty of the same. The Corporation shall have power to purchase in the open market at any time and at any price not to exceed par any of the bonds issued by it. Any such bonds so purchased may, with the approval of the Secretary of the Treasury, be sold or resold at any time and at any price. For a period of six months after the date this

subsection, as amended, takes effect, the Corporation is authorized to refund any of its bonds issued prior to such date or any bonds issued after such date in compliance with commitments of the Corporation outstanding on such date, upon application of the holders thereof, by exchanging therefor bonds of an equal face amount issued by the Corporation under this subsection as amended, and bearing interest at such rate as may be prescribed by the Corporation with the approval of the Secretary of the Treasury; but such rate shall not be less than that first fixed after this subsection, as amended, takes effect on bonds exchanged by the Corporation for home mortgages. For the purpose of such refunding the Corporation is further authorized to increase its total bond issue in an amount equal to the amount of the bonds so refunded. Nothing in this subsection shall be construed to prevent the Corporation from issuing bonds in compliance with commitments of the Corporation on April 27, 1934.

(d) *Exchange of bonds for mortgages; amortization of mortgages; interest rates.* The Corporation is authorized, for a period of three years after June 13, 1933, (1) to acquire in exchange for bonds issued by it, home mortgages and other obligations and liens secured by real estate (including the interest of a vendor under a purchase-money mortgage or contract) recorded or filed in the proper office or executed prior to June 13, 1933, and (2) in connection with any such exchange, to make advances in cash to pay the taxes and assessments on the real estate, to provide for necessary maintenance and make necessary repairs, to meet the incidental expenses of the transaction, and to pay such amounts, not exceeding \$50, to the holder of the mortgage, obligation, or lien acquired as may be the difference between the face value of the bonds exchanged plus accrued interest thereon and the purchase price of the mortgage, obligation, or lien. The face value of the bonds so exchanged plus accrued interest thereon and the cash so advanced shall not exceed in any cash \$14,000, or 80 per centum of the value of the real estate as determined by an appraisal made by

the Corporation, whichever is the smaller. In any case in which the amount of the face value of the bonds exchanged plus accrued interest thereon and the case advanced is less than the amount the home owner owes with respect to the home mortgage or other obligation or lien so acquired by the Corporation, the Corporation shall credit the difference between such amounts to the home owner and shall reduce the amount owed by the home owner to the Corporation to that extent. Each home mortgage or other obligation or lien so acquired shall be carried as a first lien or refinanced as a home mortgage by the Corporation on the basis of the price paid therefor by the Corporation, and shall be amortized by means of monthly payments sufficient to retire the interest and principal within a period of not to exceed fifteen years; but the amortization payments of any home owner may be made quarterly, semi-annually, or annually, if in the judgment of the Corporation the situation of the home owner requires it. Interest on the unpaid balance of the obligation of the home owner to the Corporation shall be at a rate not exceeding 5 per centum per annum. The Corporation may at any time grant an extension of time to any home owner for the payment of any installment of principal or interest owed by him to the Corporation if, in the judgment of the Corporation, the circumstances of the home owner and the condition of the security justify such extension. As used in this subsection, the term "real estate" includes only real estate held in fee simple or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable, or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed, upon which there is located a dwelling or dwellings for not more than four families, which is used in whole or in part by the owner as a home or held by him as his homestead, and which has a value of not to exceed \$20,000. No discrimination shall be made under this chapter against any home mortgage by reason of the fact that the real estate securing such mortgage is located in a municipality, county, or taxing district which is in default upon any of its obligations.

For the purposes of this chapter, levies of assessments upon real property, made by any special district organized in any State for public improvements, shall be treated as general-tax levies are treated. The Board shall determine the reasonableness of the total annual burden of taxes and assessments of all kinds upon any property offered as security for the payment of a loan made by the Corporation and the effect of the total levies upon the loanable value of such property, but no deduction shall be made from the loanable value of any property for levies not due at the time of making such loan in any instance where the total annual taxes and assessments borne by the said property for all purposes does not exceed a sum which, in the discretion of the Board, is a reasonable annual tax burden for such property.

(e) *Cash loans on unincumbered property; interest.* The Corporation is further authorized, for a period of three years from June 13, 1933, to make loans in cash subject to the same limitations and for the same purposes for which cash advances may be made under subsection (d) of this section, in cases where the property is not otherwise encumbered; but no such loan shall exceed 50 per centum of the value of the property securing the same as determined upon an appraisal made by the Corporation. Each such loan shall be secured by a duly recorded home mortgage, and shall bear interest at the same rate and shall be subject to the same provisions with respect to amortization and extensions as are applicable in the case of obligations refinanced under subsection (d) of this section.

(f) *Cash loans on mortgaged property; interest.* The Corporation is further authorized, for a period of three years from June 13, 1933, in any case in which the holder of a home mortgage or other obligation or lien eligible for exchange under subsection (d) of this section does not accept the bonds of the Corporation in exchange as provided in such subsection and in which the Corporation finds that the home owner cannot obtain a loan from ordinary lending agencies, to make cash advances to such home owner in an amount not

to exceed 40 per centum of the value of the property for the purposes specified in such subsection (d). Each such loan shall be secured by a duly recorded home mortgage and shall bear interest at a rate of interest which shall be uniform throughout the United States, but which in no event shall exceed a rate of 6 per centum per annum, and shall be subject to the same provisions with respect to amortization and extensions as are applicable in cases of obligations refinanced under subsection (d) of this section.

(g) *Loans to redeem foreclosed property.* The Corporation is further authorized to exchange bonds and to advance cash to redeem or recover homes lost by the owners by foreclosure or forced sale by a trustee under a deed or trust or under power of attorney or by voluntary surrender to the mortgagee subsequent to January 1, 1930, subject to the limitations provided in subsection (d) of this section.

(h) *Appraisal rules.* The Board shall make rules for the appraisal of the property on which loans are made under this section so as to accomplish the purposes of this chapter: *Provided*, That no person shall be allowed to act as appraiser if he is in the employ of any company holding a loan on the property, or if he is interested in the subject matter of the loan.

(i) *Payment of loans in bonds of Corporation.* Any person indebted to the Corporation may make payment to it in part or in full by delivery to it of its bonds which shall be accepted for such purpose at face value.

(j) *Officers and employees; compensation; free use of mails.* The Corporation shall have power to select, employ, and fix the compensation of such officers, employees, attorneys, or agents as shall be necessary for the performance of its duties under this chapter, without regard to the provisions of other laws applicable to the employment or compensation of officers, employees, attorneys, or agents of the United States. No such officer, employee, attorney, or agent shall be

paid compensation at a rate in excess of the rate provided by law in the case of the members of the Board. The Corporation shall be entitled to the free use of the United States mails for its official business in the same manner as the executive departments of the Government, and shall determine its necessary expenditures under this chapter and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditure of public funds. The Corporation shall pay such proportion of the salary and expenses of the members of the Board and of its officers and employees as the Board may determine to be equitable, and may use the facilities of Federal Home Loan Banks, upon making reasonable compensation therefor as determined by the Board. No person shall be appointed or retained as an officer, employee, agent, or attorney, at a fixed salary, in any regional or State office of the Corporation who is an officer or director of any firm, corporation, or association engaged in lending money on real estate; nor shall any person be appointed or retained as an officer, employee, agent, or attorney in any State or district office of the Corporation, who has not been a *bona fide* resident of the State served by such office for a period of at least one year immediately preceding the date of his appointment.

(k) *By-laws, rules and regulations; cancellation of bonds; liquidation of Corporation; dividends.* The Board is authorized to make such by-laws, rules and regulations, not inconsistent with the provisions of this section, as may be necessary for the proper conduct of the affairs of the Corporation. The Corporation is further authorized and directed to retire and cancel the bonds and stock of the Corporation as rapidly as the resources of the Corporation will permit. All payments upon principal of loans made by the Corporation shall under regulations made by the Corporation be applied to the retirement of the bonds of the Corporation. Upon the retirement of such stock, the reasonable value thereof as determined by

the Board shall be paid into the Treasury of the United States and the receipts issued therefor shall be canceled. The Board shall proceed to liquidate the Corporation when its purposes have been accomplished, and shall pay any surplus or accumulated funds into the Treasury of the United States. The Corporation may declare and pay such dividends to the United States as may be earned and as in the judgment of the Board it is proper for the Corporation to pay.

(1) *When mortgagor must be in default.* No home mortgage or other obligation or lien shall be acquired by the Corporation under subsection (d), and no cash advance shall be made under subsection (f), unless the applicant was in involuntary default on June 13, 1933, with respect to the indebtedness on his real estate and is unable to carry or refund his present mortgage indebtedness: *Provided*, That the foregoing limitation shall not apply in any case in which it is specifically shown to the satisfaction of the Corporation that a default after such date was due to unemployment or to economic conditions or misfortune beyond the control of the applicant.

(m) *Advances for rehabilitation, modernization, etc., of homes.* In all cases where the Corporation is authorized to advance cash to provide for necessary maintenance and to make necessary repairs it is also authorized to advance cash or exchange bonds for the rehabilitation, modernization, rebuilding and enlargement of the homes financed; and in all cases where the Corporation has acquired a home mortgage or other obligation or lien it is authorized to advance cash or exchange bonds to provide for the maintenance, repair, rehabilitation, modernization, rebuilding, and enlargement of the homes financed and to take an additional lien, mortgage, or conveyance to secure such additional advance or to take new home mortgage for the whole indebtedness; but the total amount advanced shall in no case exceed the respective amounts or

percentages of value of the real estate as elsewhere provided in this section. Not to exceed \$400,000,000 of the proceeds derived from the sale of bonds of the Corporation shall be used in making cash advances to provide for necessary maintenance and necessary repairs and for the rehabilitation, modernization, rebuilding and enlargement of real estate securing the home mortgages and other obligations and liens acquired by the Corporation under this section.

(n) *Purchase of obligations of other banks and associations.* The Corporation is authorized to purchase Federal Home Loan Bank bonds, debentures, or notes, or consolidated Federal Home Loan Bank bonds or debentures. The Corporation is also authorized to purchase full-paid-income shares of Federal Savings and Loan Associations after the funds made available to the Secretary of the Treasury for the purchase of such shares have been exhausted. Such purchases of shares shall be on the same terms and conditions as have been heretofore authorized by law for the purchase of such shares by the Secretary of the Treasury: *Provided*, That the total amount of such shares in any one association held by the Secretary of the Treasury and the Corporation shall not exceed the total amount of such shares heretofore authorized to be held by the Secretary of the Treasury in any one association. The Corporation is also authorized to purchase shares in any institution which is (1) a member of a Federal Home Loan Bank, or (2) whose accounts are insured under sections 1724 to 1730 of this title, if the institution is eligible for insurance under such title; and to make deposits and purchase certificates of deposit and investment certificates in any such institution. Of the total authorized bond issue of the Corporation \$300,000,000 shall be available for the purposes of this subsection, without discrimination in favor of Federally chartered associations, and bonds of the Corporation not exceeding such amount may be sold for the purposes of this subsection. (June 13, 1933, c. 64, §4, 48 Stat. 129; April

27, 1934, c. 168, §§1 (a), 2, 3, 4, 13, 48 Stat. 643, 644, 645, 647; June 27, 1934, c. 847, §§506 (a), (b), 508 (b), 48 Stat. 1263, 1264; May 28, 1935, c. 150, §§10-16, 17 (a), 49 Stat. 296-297.)

§1463a. Bonds issued under original provisions; interest and principal.

The amendments made by the Act of April 27, 1934, to subsection (c) of section 1463 of this title (except with respect to refunding) shall not apply to any bonds prior to April 27, 1934, issued by the Home Owners' Loan Corporation under such subsection (c) of section 1463, or to any bonds thereafter issued in compliance with commitments of the Corporation outstanding on April 27, 1934. (April 27, 1934, c. 168, §1 (b), 48 Stat. 644.)

§1463b. Purchase of obligation of, or loans to, Federal Home Loan Banks [Repealed].

§1464. Federal Savings and Loan Associations.

(a) *Organization authorized.* In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations," and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

(b) *Capital; deposits; certificates of indebtedness.* Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board.

(c) *Loans; security required; investment of assets.* Such associations shall lend their funds only on the security of their shares or on the security of first liens upon homes or combination of homes and business property within fifty miles of their home office: *Provided*. That not more than \$20,000 shall be loaned on the security of a first lien upon any one such property; except that not exceeding 15 per centum of the assets of such association may be loaned on other improved real estate without regard to said \$20,000 limitation, and without regard to said fifty-mile limit, but secured by first lien thereon: *And provided further*, That any portion of the assets of such associations may be invested in obligations of the United States or the stock or bonds of a Federal Home Loan Bank: *And provided further*, That any such association which is converted from a State-chartered institution may continue to make loans in the territory in which it made loans while operating under State charter.

(d) *Rules and regulations.* The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.

(e) *Qualifications of incorporators; selection of localities for establishment.* No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

(f) *Associations as members of Federal Home Loan Bank.* Each such association, upon its incorporation, shall become automatically a member of the Federal Home Loan Bank of the district in which it is located, or if convenience shall require and the Board approve, shall become a member of a Federal Home Loan Bank of an adjoining district. Such associations shall qualify for such membership in the manner provided in chapter 11 of this title with respect to other members.

(g) *Subscription to preferred stock by United States; retirement.* The Secretary of the Treasury is authorized on behalf of the United States to subscribe for preferred shares in such associations which shall be preferred as to the assets of the association and which shall be entitled to a dividend, if earned, after payment of expenses and provision for reasonable reserves, to the same extent as other shareholders. It shall be the duty of the Secretary of the Treasury to subscribe for such preferred shares upon the request of the Board; but the subscription by him to the shares of any one association shall not exceed \$100,000, and no such subscription shall be called for unless in the judgment of the Board the funds are necessary for the encouragement of local home financing in the community to be served and for the reasonable financing of homes in such community. Payment on such shares may be called from time to time by the association, subject to the approval of the Board and the Secretary of the Treasury; but the amount paid in by the Secretary of the Treasury shall at no time exceed the amount paid in by all other shareholders, and the aggregate amount of shares held by the Secretary of the Treasury shall not exceed at any time the aggregate amount of shares held by all other shareholders. To enable the Secretary of the Treasury to make such subscriptions when called there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$100,000,000, to be immediately available and to remain available until ex-

pended. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by the Board, and such receipts shall be evidence of the interest of the United States in such preferred shares to the extent of the amount so paid. Each such association shall make provision for the retirement of its preferred shares held by the Secretary of the Treasury, and beginning at the expiration of five years from the time of the investment in such shares, the association shall set aside one third of the receipts from its investing and borrowing shareholders to be used for the purpose of such retirement. In case of the liquidation of any such association the shares held by the Secretary of the Treasury shall be retired at par before any payments are made to other shareholders.

(h) *Exemptions from taxation.* Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States, and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

(i) *Conversion of member of Federal Home Loan Bank into Federal Savings and Loan Association.* Any member of a Federal Home Loan Bank may convert itself into a Federal savings and loan association under this chapter upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be en-

titled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this chapter.

(j) *Subscription to full paid income shares by United States.* In addition to the authority to subscribe for preferred shares in Federal savings and loan associations, the Secretary of the Treasury is authorized on behalf of the United States to subscribe for any amount of full paid income shares in such associations, and it shall be the duty of the Secretary of the Treasury to subscribe for such full paid income shares upon the request of the Federal Home Loan Bank Board. Payment on such shares may be called from time to time by the association, subject to the approval of said Board and the Secretary of the Treasury, and such payments shall be made from the funds appropriated pursuant to subsection (g) of this section; but the amount paid in by the Secretary of the Treasury for shares under this subsection and such subsection (g), together shall at no time exceed 75 per centum of the total investment in the shares of such association by the Secretary of the Treasury and other shareholders. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by said Board and such receipts shall be evidence of the interest of the United States in such full paid income shares to the extent of the amount so paid. No request for the repurchase of the full paid income shares purchased by the Secretary of the Treasury shall be made for a period of five years from the date of such purchase, and thereafter requests by the Secretary of the Treasury for the repurchase of such shares by such associations shall be made at the discretion of the Board; but no such association shall be requested to repurchase any such shares in any one year in an amount in excess of 10 per centum of the total amount invested in such shares by the Secretary of the Treasury. Such repurchases shall be made in accordance with the

rules and regulations prescribed by the Board for such associations.

(k) *Federal savings and loan associations, or Federal Home Loan Banks as fiscal agents of United States.* When designated for that purpose by the Secretary of the Treasury, any Federal savings and loan association or member of any Federal Home Loan Bank may be employed as fiscal agent of the Government under such regulations as may be prescribed by said Secretary and shall perform all such reasonable duties as fiscal agent of the Government as may be required of it. Any Federal savings and loan association or member of any Federal Home Loan Bank may act as agent for any other instrumentality of the United States when designated for that purpose by such instrumentality of the United States. (June 13, 1933, c. 64, §5, 48 Stat. 182; Apr. 27, 1934, c. 168, §§ 5, 6, 48 Stat. 645, 646; May 28, 1935, c. 150, §18, 49 Stat. 297.)

§1465. Encouragement of saving and home financing.

To enable the Board to encourage local thrift and local home financing and to promote, organize, and develop the associations herein provided for or similar associations organized under local laws, there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$150,000, to be immediately available and remain available until expended, subject to the call of the Board, which sum, or so much thereof as may be necessary, the Board is authorized to use in its discretion for the accomplishment of the purposes of this section without regard to the provisions of any other law governing the expenditure of public funds. For the purposes of this section the Secretary of the Treasury is authorized and directed to allocate and make immediately available to the Board, out of the funds appropriated pursuant to section 1464 (g), the sum of \$700,000. Such sum shall be in addition to the funds appropriated pursuant to this section, and shall be subject to the call

of the Board and shall remain available until expended. The sums appropriated and made available pursuant to this section shall be used impartially in the promotion and development of local thrift and home-financing institutions, whether State or Federally chartered. (June 13, 1933, c. 64 §6, 48 Stat. 134; Apr. 27, 1934, c. 168, §11, 48 Stat. 647; May 28, 1935, c. 150, §19, 49 Stat. 297.)



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1938.

No. 478.

MARK GRAVES, JOHN J. MERRILL and JOHN P.
HENNESSY, as Commissioners constituting the
State Tax Commission of the State of New York,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
upon the Relation of JAMES B. O'KEEFE.

ON CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONERS.

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vs.

THE PEOPLE OF THE STATE OF NEW YORK,
upon the Relation of **JAMES B. O'KEEFE.**

BRIEF FOR PETITIONERS.

The Decisions of the Courts Below.

The decision of the Appellate Division of the Supreme Court, Third Judicial Department, is reported in 253 App. Div. (N. Y.) 91. The memorandum decision and dissenting opinion of Crapser, J. appears at pp. 45-50 of the Record.

The decision of the Court of Appeals is reported in 278 N. Y. 221 and appears in the Record at page 1, [fol. b.] No opinion was written other than the memorandum citing the authority of *Rogers v. Graves*, (299 U. S. 401) as the basis for the decision.

Statement.

1. The appeal herein comes to this Court by certiorari granted December 19, 1938, and issuing to the Supreme Court of the State of New York to review the judgment of that Court under date of August 19, 1938. That judgment was entered upon the affirmance of the final order by the Court of Appeals, directing the refund to the relator O'Keefe of his personal State income tax for the year 1934 in the sum of \$57.28. With the costs and disbursements the judgment for \$257.08 was entered (R. pp. 2-3).

2. This Court has jurisdiction under §237 (b) of the Judicial Code (28 U. S. C. A. §344).

3. Relator was employed in the calendar year 1934 as an attorney at law at a fixed salary by the Home Owners' Loan Corporation. He received as such salary in the year 1934 the sum of \$2246.66 on which he paid a tax of \$57.28 for which refund was sought by him (fol. 57). The Tax Commission of New York State denied the refund (fols. 8-9) and the taxpayer sought a review by certiorari in the Appellate Division of the Supreme Court, Third Judicial Department (fols. 6-7). That Court reversed the determination of the Tax Commission and directed a refund, holding the Relator's salary immune on the authority of *People ex rel. Rogers v. Graves*, (299 U. S. 401) (fol. 63). There were two dissents expressed in the opinion of Crapser, J. (fols. 66-72 inc.). The Court of Appeals affirmed on the express authority of *People ex rel. Rogers v. Graves* (299 U. S. 401) (fols. a-b).

Facts.

Relator O'Keefe, an attorney, was employed by the Home Owners' Loan Corporation, a public corporation created under the Home Owners' Loan Act of 1933 (48 U. S. Stat. at Large, 128), Sec. 4-a thereof (fol. 12). He was not in the Civil Service, received his appointment orally; was paid by check of the Home Owners' Loan Corporation (fols. 11, 43). The Home Owners' Loan Corporation¹ "was created to meet an emergency" in aid of distressed home owners (fol. 31). It was empowered for three years of activity (1) to acquire mortgages and liens secured by real estate in exchange for its bonds; (2) to make cash advances for taxes, assessments and repairs in connection with such transactions; (3) to make cash loans on unencumbered property to 50 percentum thereof, secured by interest-bearing mortgage; (4) to advance in cash up to 40 percentum of the value of property where the holder of a home mortgage does not accept bonds in exchange (fol. 13).

The stock of the H.O.L.C. is owned by the United States, subscribed for by the Secretary of the Treasury, and its bonds are guaranteed by the United States as to principal and interest (fol. 13). The corporation dealt with corporate as well as individual owners of houses, the sole requirement being that the property be in distress and without refunding means (fol. 37). Loans were made for installation of heating system or other repairs (fols. 38-40), and were permitted up to 80% of the appraised value of the property with a

¹Hereinafter designated as the H. O. L. C.

maximum loan of \$14,000 (fol. 41). Relator O'Keefe was an examining and supervising attorney, on full time and at a stated salary (fols. 22-4). The checks for his salary were drawn on the Treasury of the United States, signed by the Treasurer of the corporation (fol. 35).

The Tax Commission held that the salary of relator O'Keefe was taxable under the State Tax Law; that he was not an employee or official of the United States, nor was his compensation received from the United States, but from a separate corporate entity; that the functions of the H. O. L. C. were not essential or usual governmental functions, referring specifically to *People ex rel. Rogers v. Graves* (*supra*); *Ohio v. Helvering*, 292 U. S. 360; *Flint v. Stone Tracy*, 220 U. S. 108; *Helvering v. Powers*, 293 U. S. 214 (fol. 16). As above indicated, the reversal and judgment sought herein to be reviewed were based on the *Rogers* case (*supra*).

Statutes.

The State Tax Law is set forth at "Appendix A" to the Petition for Certiorari herein. So far as pertinent §359-par. 2-f excludes from gross income for State income tax purposes:

"Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States." (fol. 10.)

The Home Owners' Loan Act of 1933 appears in full as "Appendix B" to the Petition for Certiorari herein.

Specifications of Errors.

The errors relied upon are set forth at length in the Petition for Certiorari. Petitioners submit that the Court of Appeals of New York State erroneously believed itself bound, by reason of this Court's decision in *Rogers v. Graves*, 299 U. S. 401, to hold the taxpayer exempt from the State income tax. The full purport of this Court's determination in *Helvering v. Gerhardt*, 304 U. S. 405, it is respectfully submitted, was not accepted by the Court of Appeals, the said Court of Appeals erring in not holding:

(a) The functions of the Home Owners' Loan Corporation were not essential to the preservation or functioning of the Government of the United States.

(b) The taxpayer herein was not an official or employee of the United States to warrant exemption on such basis.

(c) The burden of the personal income tax of the State in this case upon the Government of the United States was clearly speculative and uncertain, being wholly or substantially absorbed by the individual.

(d) The doctrine of governmental constitutional immunity did not apply to the taxpayer herein.*

Issue.

Is the salary of relator O'Keefe, an employee or officer of the Home Owners' Loan Corporation, exempt

*These state the substance of the errors relied upon.

from non-discriminatory personal income taxes imposed by the State of New York?

Summary of Argument.

1. There is no constitutional or statutory immunity which protects the officers or employees of the Home Owners' Loan Corporation from a non-discriminatory State income tax. The functions of the H. O. L. C. are not such that the preservation of the Government of the United States depends upon them. The business of the H. O. L. C. differs in no substantial respect from private mortgage financing. The rule laid down in *Helvering v. Gerhardt*, 304 U. S. 405, makes it clear in the instant case that the burden of the tax herein is entirely absorbed by the taxpayer, and so far as the Federal government is concerned, is speculative. The Home Owners' Loan Act of 1933 furnishes no basis for, nor evidence of any intention to grant the immunity sought by O'Keefe.

2. Under any reasonable test, whether of the functions of the agency, or of the individual, the taxpayer herein is not entitled to immunity.

I.

EMPLOYEES AND OFFICERS OF THE HOME OWNERS' LOAN CORPORATION ENJOY NO CONSTITUTIONAL OR STATUTORY IMMUNITY FROM NON-DISCRIMINATORY STATE TAXATION OF THEIR SALARIES.

(A) *On Constitutional Immunity.*

Protection of both national and State governments, one from the destruction by the other, is a *sine qua non* of a truly Federal system.

"This principle has arisen out of what the Court says is necessity—the necessity of preserving such governments' separate and sovereign existences. . . . The effect of such taxation on the individual has not been the activating cause of the decisions."

Gutkin—Taxing Tax-Immune Income, 26 Cal. Law R. 579/585 (1938).

The compromises which result from the necessary consequences of such preservation of governments may at times be arbitrary. Their purpose is to maintain the interests of the nation and yet not restrict the States unduly. It is the States that are sovereign in origin. The sovereignty of the national government, if such it be termed, arises from a delegation of express powers and their necessary implications. Hence the sovereignty of the State cannot be carried to where it would impinge upon those "means which are employed by Congress to carry into execution powers conferred on that body by the People of the United States."² Aside from that limitation the sovereign State might

²*McCulloch v. Maryland*, 4 Wheat 316/429.

tax "all subjects over which the sovereign power of the State extends."³ Only through the discovery of a constitutional immunity will the Court not be driven "to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use and what degree may amount to an abuse of power."⁴

It has never heretofore been doubted that the doctrine of immunity of Federal instrumentalities from State taxation and of State instrumentalities from Federal taxation is reciprocal. Whatever has been of such character and relationship to the one as to warrant immunity, has brought similar immunity to the other.

Collector v. Day, 11 Wall. 113/127.

Ambrosini v. U. S., 187 U. S. 1/7.

So. Carolina v. U. S., 199 U. S. 437/451-2.

Indian Motorcycle Co. v. U. S., 283 U. S. 570/579.

Trinityfarm Construction Co. v. Grosjean, 291 U. S. 471.

Metcalf & Eddy v. Mitchell, 269 U. S. 514/522.

In *Metcalf & Eddy v. Mitchell* this Court took some pains to enumerate the character of functions or instances coming within the immunity, such as obligations sold to raise public funds, agencies through which direct sovereign functions are exercised, investments of public funds for public purposes, etc. (p. 522).

The Chief Justice in *Helvering v. Powers*, 293 U. S. 214, marked a like distinction in the character of trans-

³*Ibid.*

⁴*Ibid.* at 420.

actions or functions performed, using as examples of sources of revenue that might not be withdrawn from Federal taxation, the cases of *So. Carolina v. U. S.* (*supra*) and *Ohio v. Helvering*, 292 U. S. 360. We cannot believe that the reciprocal rule will now be cast aside and different standards be set up for Federal and State agencies. Nor do we observe any necessity for a rule that will disregard the functions performed by individuals in determining their taxability. This Court is not here called on to pass upon the taxability of the salaries of officers of government, like the Governor of a State or those immediately concerned with its direct functioning, like judges of the courts. *Collector v. Day* (*supra*) does not necessarily rest upon the precedent of *McCulloch v. Maryland* (*supra*), but upon its own original and independent reasoning, with citation of the latter case by way of analogy. We doubt that this Court will abandon the rule of reciprocal immunity of such long and established standing. The present or like cases furnish no reason for such departure.

In the long line of cases deriving from *McCulloch v. Maryland* (4 Wheat. 316); *Dobbins v. Erie County* (16 Pet. 435); *Collector v. Day* (11 Wall. 113) and down through *Indian Motorcycle Co. v. U. S.* (283 U. S. 570); *Helvering v. Powers* (293 U. S. 214); *Rogers v. Graves* (299 U. S. 401); *Brush v. Commissioner* (300 U. S. 352) one can discern the reasoning upon which has been built a thesis of constitutional immunity. In the case of the Federal government the immunity is founded on the powers granted and implied; in the case of the State it is based on their original and continued sovereignty and "reserved powers." Where

the agency, instrumentality or function was a proper part of the government thus functioning, it was immune from taxation by the other sovereign. This immunity was carried through to protect the salaries of the officers and employees.

Brush v. Commissioner (supra);

Rogers v. Graves (supra);

Dobbins v. Erie County (supra).⁵

By the above process the question whether a given tax would impede or burden a Federal agency or State instrumentality became a question of degree. "The question of interference with government, I repeat, is one of reasonableness and degree * * *."

Holmes, J.—dissenting in *Panhandle Oil Co. v. Knox*, 277 U. S. 218/225.

Until the determination of *Helvering v. Gerhardt* (304 U. S. 405) this Court proceeded to mark out the immunity from the functions performed and their relationship to the government involved. Mr. Justice Stone in *Indian Motorcycle Co. v. U. S.* (283 U. S. 570/580) in a dissent strongly urged limiting rather than enlarging the "implied immunity of one government, either national or state, from taxation by the other." But there is no doubt that the reciprocal immunity is there recognized. The sole problem is the extent to which taxation would be regarded as infringing on the said immunity.

The courts below rested their decisions in the case at bar solely on the authority of *Rogers v. Graves*, 299 U. S. 401. Unanimously this court there determined

⁵In *Dobbins v. Erie Co.* there was the added ground expressly stated by the Court, that Congress had fixed the compensation. p. 449.

that New York State might not tax the income of Rogers, an officer of the Panama Railroad Company, a New York corporation, because the company was performing a function whose primary purpose was "legitimately governmental." The immunity of the instrumentality of the Federal government covered the officers and the company itself. The Court of Appeals of New York State presumably felt that any modification or limitation of the doctrine of the *Rogers* case should come from this Court.

In *Helvering v. Gerhardt* (*supra*) we find what appears to be a fundamental departure from the decisions on the rule of immunity from taxation. The necessity of inquiry into the nature of the governmental function performed is abandoned in that case. In argument and brief in the *Gerhardt* case the Attorney General of the United States conceded that if the function were properly governmental then salary immunity from taxation followed.⁶ Both sides rested their arguments on the nature of the functions. This Court, however, announced a new rule. Employee implied immunity as formerly pronounced is questioned. Two guiding principles are now stated: (1) Implied immunity cannot be recognized where the function is not essential to the preservation of the government itself. (2) 'The burden of the tax (on employees) on the government irrespective of the function itself, is speculative because it is "substantially or entirely absorbed by private persons.'"

How will a Federal tax be absorbed by the person, but a like State tax burden the Federal government?

⁶Minutes of Argument—pp. 3, 32—Brief of Petitioner—*Gerhardt* case—pp. 30-31.

⁷The effect of a tax on a salary directly fixed by or paid directly to an official of the governmental unit (State or Federal) is left open.

Why is a tax on the salary of a Judge or Governor less speculative than that on a policeman, clerk or tunnel engineer? Can it be contended that the burden, although "speculative", shifts or differs with the function?

It would seem fairly clear that if the burden of the employee's salary is speculative or uncertain, it is the same whether the taxpayer be Federal or State employee.^{1a} Both come within Justice Stone's precept of "a duty to support" the governments under which they live. The quality of relationship of *O'Keefe* in the instant case to New York State is no different from that of *Gerhardt* to the United States. In both cases human beings serve as instruments of government at an agreed salary; both receive the benefits and protection of the governments which sought to impose the tax; in both cases the taxpayer's income is diminished by the tax. This reasoning parallels that of Mr. Justice Roberts in his dissent in *Brush v. Commissioner*, 300 U. S. 352.

In respect of the functions performed by the H.O.L.C. extended argument can add little to the review of its purposes and transactions outlined above (pp. 3-4). We find in such activities no such direct or tangible connection with the powers expressly delegated to the United States in the Constitution as to warrant the conclusion that complete immunity should flow therefrom. Any private banking or lending corporation indulges in like activities. Any mortgage loan corporation covers most of the gamut of the H.O.L.C. activi-

^{1a} *Indian Motorcycle Co. v. U. S.*, 283 U. S. 570/579.

"Under the constitutional principle the exertion of such a function by a state or a state agency has the same immunity from Federal taxation that like exertions by the United States or its agencies have from state taxation."

ties. Whether they are termed "proprietary" in the sense of *Helvering v. Powers* (293 U. S. 214) or not, they certainly are not so closely bound up with necessary governmental functions as those of the Port of New York Authority are with the States of New York and New Jersey. We observe no sound reason why the principle, that governmental immunity shall not be applied so as cripple the taxing power of the other sovereignty, should not be enforced in the instant case. The Federal government has engaged in activities of an ordinary character not inherent in our governmental system. A source of revenue otherwise available to New York State should not thereby be taken away. *Willcuts v. Bunn*, 282 U. S. 216/225; *James v. Dravo Contracting Co.*, 302 U. S. 134.

If the liability to tax is incompatible with the concept of sovereignty, no distinction can be made between the States and the Government of the United States. Certainly no such distinction may be based upon the suggestion that the States are represented in Congress and may therefore protect their reserved rights or powers in the Houses of Congress. We are dealing with reserved sovereignty with which representation has nothing to do. This Court has always been alert to defend both the delegated powers of the Federal Government and the reserved powers of the States. Majorities in Congress are not a proper substitute for constitutional amendments. We doubt that this Court will surrender the reserved sovereignty of the States to the tender mercies of a Congressional majority.

In the light of the obvious movement of the law to restrict immunities from taxation, we find no constitu-

tional basis for exemption of the employees of the H.O.L.C. from non-discriminatory State income taxes. The test being that of a burden on the government whose functions are being performed, there is here no such burden, direct or even indirect, as to warrant the exemption granted below on the authority of *Rogers v. Graves* (*supra*).

B. On Statutory Immunity.

It has been argued at times that the immunity of Federal agencies is frequently a matter of statutory—*i. e.*, Congressional—intent.⁸ Where such immunity is not expressed in explicit exemption, it has been said that it will not be implied. Thus, it is often urged, you can avoid entirely the necessity of maintaining a doctrine of so-called constitutional immunity.

King County v. U. S. Shipping Board, 282
Fed. 950/952;

Federal Land Bank v. Priddy, 295 U. S.
229/231, 235;

Dobbins v. Erie County, 16 Pet. 435/449.

No necessity exists in the instant case for resort to such reasoning. No implied immunity should be read into a statute which expressly declared the exemptions that were effective. Section 1463 (c) of the Home Owners' Loan Act reads:

"The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession

⁸"Thus the immunity doctrine seems to be losing its constitutional significance. It is becoming a question of 'Congressional Intent'." Dowling, Cheatham and Hall, 36 Col. L. Rev. 351/357.

thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed."

The enumeration of exemptions is too carefully drawn to permit of any implied exemption to employees' or officers' salaries. Implied immunity in a like statutory provision was denied by this Court in *Baltimore National Bank v. State Tax Commission of Maryland*, 297 U. S. 209/214. It may also be argued that Congress had impliedly consented to such taxation, either where no exemption is expressed, or where it appears that the burden on the Federal government will be found to be too remote. If the burden be of such weight or significance, Congress can protect itself by an express exemption.

James v. Dravo Contracting Co., 302 U. S. 134;

Dual Federalism Today, 38 Col. L. Rev. 142;
The Silence of Congress, 41 Harvard L. Rev. 200.

Applying the test laid down by Mr. Justice Stone in *Helvering v. Gerhardt*, 304 U. S. 405, 411:

"Since the acts of Congress within its constitutional powers are supreme, the validity of state taxation of federal instrumentalities must depend (a) on the power of Congress to create the instrumentality and (b) its intent to protect it from state taxation."

No intent is observed in the language or substance of the Home Owners' Loan Act of 1933 to furnish immunity from State taxation to the employees of the corporation.

II.

INTERFERENCE WITH THE OPERATION OF GOVERNMENT FURNISHES AN APPROPRIATE TEST FOR IMMUNITY FROM TAXATION. BY SUCH TEST NO IMMUNITY SHOULD BE ACCORDED THE TAXPAYER HEREIN.

It may be safely assumed that where Congress has expressly granted an exemption from taxation, the operations so guarded are deemed to be of a degree of importance to the government that taxation would be an interference. So, too, where Congress has expressly waived what might otherwise have been held to be an immune operation, we may reason that the particular function so permitted to be burdened is not vital to the operation of government. While Congress may be permitted to consent to taxation of functions of the Federal government, it does not necessarily follow that Congress may impose taxes on a State's functions of government. The limitation inherent in this last situation is the effect of the tax on the operations of the government of the State. This latter problem is not present in the instant case, but is found in the periphra of issues arising from the mistaken theory that there is an entirely different basis for immunity of Federal instrumentalities from a State's government and its activities.⁹

We suggest that immunity from taxation, where Congress has not acted by affirmative exemption, even where implied consent may be observed, should be tested by the directness of the relationship to, or the na-

⁹Brief of Respondant O'Keefe on Petition for Writ—Point VII; Study by Department of Justice, June 24, 1934—"Taxation of Government Bondholders and Employees."

ture of the interference with the operations of the government.

(a) The taxation of normal functions performed by government, be it of State or nation, by levying upon the revenues would seem to be so clear an interference with sovereignty or independence as to carry its own conviction of constitutional invalidity.

McCulloch v. Maryland, 4 Wheat. 316.

Clallam Co. v. U. S., 263 U. S. 341.

(b) The taxation of the securities themselves (by stamp, document tax or otherwise) or of their income would likewise appear to impose a direct burden upon governmental functioning not contemplated in our Federal system. The resultant effect on the fiscal problems of State, county, city, town and village would be possibly so destructive as to derange to a point of chaos their budgetary systems. These two would constitute categories not yet presented for decision by this Court on the basis of any so-called changing theory of constitutional immunities. As to them we trust no tax burden without consent will be sought to be imposed unless and until constitutional amendment shall have opened the way.

Pollack v. Farmers' Loan & Trust Co., 157 U. S. 429.

(c) Of a similar character, too, may be salaries of employees and officers, individual persons, whose property otherwise than in such respect has always been taxable as generally as other persons. With respect to the salaries of employees and officers of government, who are directly employed in its essential

operations; whose salaries are directly paid out of the treasury (be it nation, state, county, city, town or village); for which salaries, whether in lump sums or in budgetary line items the legislative bodies make appropriations out of government funds—as to these the directness of their relationship to the operation of normal governmental machinery is a vital consideration. In such category would fall the officers and employees of the United States government itself in its direct operation of the functions of its several departments; the officers and employees of the constitutional departments of government of States for whose salaries we find provisions made in normal State budgets; the officers and employees of accepted and normally direct operations of the governments of counties, cities, towns and villages, our traditional and historic units of local representative government. *Brush v. Commissioner* (*supra*) might be sustained on the basis of this last classification. Closely akin, would be *Rogers v. Graves* (*supra*) where the employer corporation was so closely knit with the operation of the national defense as to constitute its operations a function of the War Department of the United States. *Collector v. Day* (*supra*) also would serve as an example.

(d) Finally we come to employees and officers of agencies or instrumentalities of the governments of nation, state, counties, cities, etc. These may be considered by this Court as removed from direct and normally vital operations of the functions of government. We do not think it necessary at this time, for the purposes of this case, to attempt a classification of such functions. The extent to which

public officers and employees perform what this Court may decide to be services *essential* to the existence of government will, of course, depend on the evidence in each case. To generalize in this field from the single decision in the *Gerhardt* case would be, we submit, unfair to this Court as it might well be unwise in policy. In the *Gerhardt* case the functions of the Port Authority were not passed upon. On the record of that case this Court concluded that the individual taxpayer did not differ from an employee of a private corporation. Employee immunity if it is to be established or recognized, must depend on a showing of the nature and character of his services and their relationship to the functioning of the State (or Federal government).

III.

THE TAXPAYER O'KEEFE IS NOT AN EMPLOYEE OF THE UNITED STATES.

O'Keefe, the taxpayer herein, was no employee or officer of the United States, nor was he paid a salary by the United States. It is significant that the Court of Appeals and the Appellate Division of the Supreme Court below did not consider the taxpayer as entitled to exemption under §359, Par. 2-f of Article 16 of the Tax Law of New York State (p. 4 *supra*). He is the employee of a corporation created by the Home Loan Bank Board. Nor was any such basis given for the exemption of Mr. Rogers, General Counsel of the Panama Rail Road Company in *Rogers v. Graves* (*supra*), either by the Courts below or by this Court. The powers of the Federal government acting for national defense may furnish a ground for distinguishing

the *Rogers* case from the instant case in respect of the function performed. To the extent that it may be said that Mr. Rogers and Mr. O'Keefe occupy similar positions, it must be answered that the rule enunciated in *Helvering v. Gerhardt* (*supra*) has modified the principle of taxability of employees and officers of such instrumentalities of government. The delineation of cases we leave to this Court.¹⁰

See:

Pomeroy v. State Board of Equalization of Montana, 45 P. (2nd) 316 (Mont.).

U. S. Walter, 263 U. S. 15.

Parker v. Miss. State Tax Commissioner, 170 So. 567 (certiorari denied 302 U. S. 742).

The taxpayer O'Keefe, therefore, may not seek immunity from non-discriminatory State personal income tax as an officer or employee of the United States.

Conclusion.

Considerations of statesmanship and policy as well as judicial uniformity favor the taxability of O'Keefe. Sources of revenue for the States will not be curtailed. Harmonious relationships between States and nation will be fostered. A uniform and reciprocal judicial attitude on perplexing problems of taxation, national, state and local will be furthered. The non-discriminatory personal income tax levied by New York State upon its citizen and resident O'Keefe is

¹⁰The function of the H. O. L. C. would appear clearly "proprietary" as that term has been used judicially in tax cases (see pp. 3, 12 herein).

not of such character as to be burdensome or dangerous to the Federal Union or any of its functions.

THE DETERMINATION OF THE COURT OF APPEALS AND THE JUDGMENT ENTERED THEREON SHOULD BE REVERSED.

Respectfully submitted,

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CHARLES ELMORE DROPLEY
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IN THE

Supreme Court of the United States

October Term, 1938.

No. 478.

**MARK GRAVES, JOHN J. MERRILL and JOHN P.
HENNESSY as Commissioners constituting the
State Tax Commission of the State of New York,**
Petitioners,

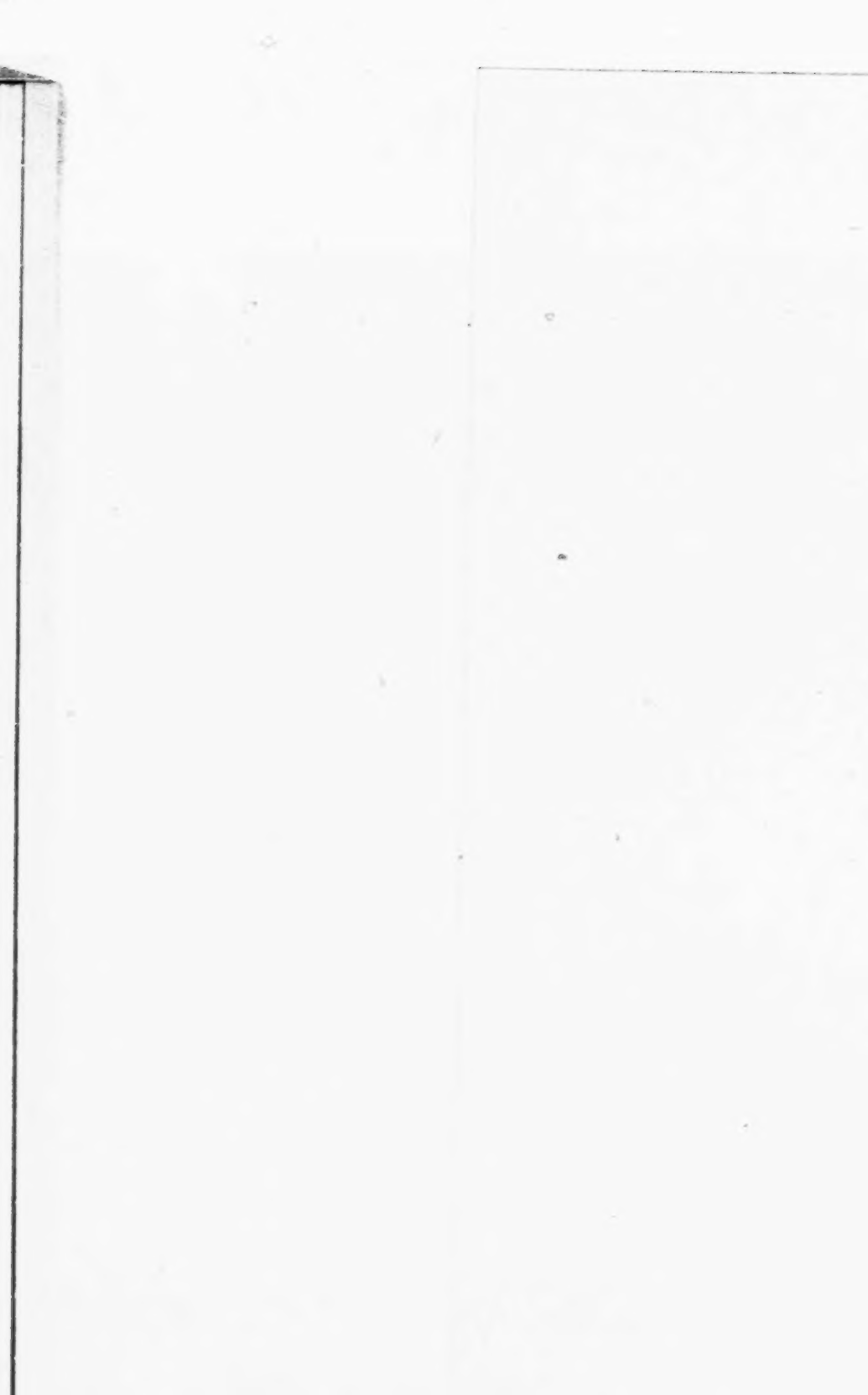
v.

THE PEOPLE OF THE STATE OF NEW YORK,
upon the relation of **JAMES B. O'KEEFE,**
on Certiorari to the Supreme Court of
the State of New York.

PETITIONERS' REPLY MEMORANDUM.

JOHN J. BENNETT, JR.,
Attorney General of New York State.

HENRY EPSTEIN,
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the State of New York.

PETITIONERS' REPLY MEMORANDUM.

Statement.

This memorandum is primarily intended merely to set forth the facts in respect of the sources from which relator O'Keefe's salary is paid. This is believed called for by reason of the statement appearing at page 15 of relator's brief:

"The salaries of employees and all administrative expenses of the Home Owners' Loan Corporation are fixed by Congress. The budget for personal services limits by 'line appropriation' that part of the available funds to be expended

for personal service. Congress recognizes that the Corporation can only act through individuals who must be compensated for their services." (Citing *Dobbins v. Commissioners, et al.*, 16 Pet. 435.)

From the said statement it may be that relator intends the conclusion to be drawn that his salary in fact is paid from an appropriation for personal service as in the case of an official or employee of the United States government itself. Such is not the case.

Facts bearing on the Home Owners' Loan Corporation and relator's salary.

The independent offices appropriation act for the fiscal year 1939 (Chapter 259—3d Session—H. R. 8837—Public No. 534—75th Congress) makes an appropriation as follows:

"Home Owners' Loan Corporation"
 "Not to exceed \$26,500,000 of the funds of the Home Owners' Loan Corporation, established by the Home Owners' Loan Act of 1933 (48 Stat. 128), shall be available during the fiscal year 1939 for administrative expenses of the Corporation, including personal services in the District of Columbia and elsewhere; * * *." (Emphasis supplied. Public 534, page 24.)

The funds are those of the Corporation, held in the Treasury as a depository. And this procedure of a Congressional limitation, it is believed, dates only from 1937, when the Corporation ceased its financing and began the process of liquidating its operations and holdings.

The salary of relator is and has heretofore been paid by the Corporation pursuant to Section 4 (j) of the Home Owners' Loan Act of 1933—(Public 43—73rd Congress), which section clearly delineates the distinction between officers or employees like relator and officers or employees of the United States:

“(j) The Corporation shall have power to select, employ, and fix the compensation of such officers, employees, attorneys, or agents as shall be necessary for the performance of its duties under this Act, without regard to the provisions of other laws applicable to the employment or compensation of officers, employees, attorneys, or agents of the United States.”

In view of the clear distinction thus drawn by Congress, it cannot be said that relator is an employee of the United States.

The Home Owners' Loan Corporation has all the earmarks of a regular private business corporation. It is operated by a board of directors, has issued capital stock and bonds for its funds, even though derived from the Treasury. The Corporation was established by the Federal Home Loan Bank Board (Act of 1932) and its primary purpose in the field of home finance may be compared to the commercial banking purposes of the Federal Reserve Banks. There are some twelve home loan banks with assets of over four billion dollars. The report of the Home Owners' Loan Corporation is included in the Annual Report of the Federal Home Loan Bank Board:

“Sixth Annual Report—Federal Home Loan Bank Board for the period of July 1, 1937-June 30, 1938—covering the operations of the

Federal Home Loan Bank System
 Federal Savings and Loan Associations
 Federal Savings and Loan Insurance Corpora-
 tion
 Home Owners' Loan Corporation."

The report is accompanied by an official letter of transmittal and is an official document printed by the United States Government Printing Office. It shows that the Home Owners' Loan Corporation began in June, 1933 and ceased active refinancing operations (its major purpose) June 12, 1936.

"Its principal activities at present are the collection and servicing of its loans, and the management and sale of the properties acquired." (p. 69)

The operations represent a deficit as of June 30, 1938 of \$40,893,292, as compared with the deficit of \$31,740,151 on June 30, 1937 (p. 91).

The corporation owns (as of June 30, 1938) 82,987 properties valued at \$437,605,041, presumably taken over through foreclosure and from defaulting mortgagors (Report p. V).

Neither relator's position nor his functions differ from those of like persons in the employ of private corporations.

The determination below should be reversed.

**Supplemental Reply Addressed to Brief Amicus
 Curiae of the United States.**

We have just received and read the brief of the Department of Justice, filed *amicus curiae* herein. With interest we note the extended and wholly impertinent argument therein addressed to the proposition that this Court should now, in this case, reconsider and overrule *The Collector v. Day*, 11 Wall. 113, and subsequent cases in line therewith. Since the instant case involves no such issue or question; since we

respect the repeated admonition of this Court to confine discussion to the facts and issues of law concerned in the case at bar, and none other; since the issue thus extraneously raised by the government's brief will inevitably come before the Court in a case where the issue may be squarely presented and the vital constitutional questions therein involved fully argued and considered—for these reasons the petitioners must decline to be drawn into a discussion of the proposition thus irrelevantly sought to be injected into the instant appeal. For the same reasons we most earnestly trust and pray that this Court will adhere to its traditional philosophy of the judicial process and decline the government's *invitation* to make the "digression from the particular case before the Court" (government's brief, p. 45). We believe it was one of the former Justices of this Court who once remarked: "Sufficient unto the day is the evil thereof. Let us do our knitting and let the Congress do theirs."

If, perchance, this Court should nevertheless be of the opinion that it wishes to reconsider the doctrine of *The Collector v. Day*, and to do so in connection with the instant appeal—then petitioners respectfully urge that opportunity be afforded for briefing the issue thus presented—and that another time be set by the Court for argument thereon.

Respectfully submitted,

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Attorney General of New York State.

HENRY EPSTEIN,
Solicitor General,
For Petitioners.



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CHARLES HENRIE GOSLEY
CLERK

IN THE
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OCTOBER TERM, 1938.

No. 478

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSY as
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Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK, upon the relation of
JAMES B. O'KEEFE,

Respondent.

**BRIEF OF RESPONDENT OPPOSING PETITION
FOR WRIT OF CERTIORARI.**

DANIEL MCNAMARA, JR.,
Solicitor for Respondent.



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THE PEOPLE OF THE STATE OF
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**BRIEF OF RESPONDENT OPPOSING PETITION
FOR WRIT OF CERTIORARI.**

JAMES B. O'KEEFE, a resident of New York, was regularly employed during the year 1934, by the Home Owners' Loan Corporation at a fixed salary. He made a personal income tax return pursuant to law and paid a tax of \$57.28 based on his earnings of \$2,246.66 at a fixed salary from the Home Owners' Loan Corporation for the year 1934. Thereafter, he applied for a refund of the tax upon the ground that the salary earned by him as an employee of the Home Owners' Loan Corporation was specifically exempt by the Tax Law

of New York from the tax because it was earned by him as an employee of the United States, and upon the further ground that the salary so earned by him was immune from such tax because the Home Owners' Loan Corporation is an instrumentality of the United States.

The application for refund was denied but that determination was reviewed and the same was annulled on certiorari. By final order and judgment of the Supreme Court of the State of New York entered after decision by the Court of Appeals, that conclusion was affirmed.

The Attorney General on behalf of the State Tax Commission now prays for a writ of certiorari to review that final determination.

The Question Presented.

Whether the fixed salary paid to respondent as a regular employee of the Home Owners' Loan Corporation is subject to income tax imposed by the State of New York?

Statutes Involved.

Section 359 of the Tax Law of the State of New York. Home Owners' Loan Act of 1933; Chapter 64, 48 U. S. Stat. at large, 128.

(See pages 34 to 52, Appendix to Petition for Certiorari.)

POINT I.

Although the petitioners faintly suggest that the Home Owners' Loan Act of 1933 is unconstitutional, they do not urge that point. Nevertheless, we challenge the assertion.

The title of the act expresses the national emergency purpose which prompted the creation of the instrumentality. It is entitled:

"An act to provide emergency relief with respect to home-mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize their debt elsewhere, to amend the Federal Home Loan Bank Act, to increase the market for obligations of the United States, and for other purposes."

The President in his message to Congress on April 13th, 1933, recommending this legislation, said, in part:

"As a further and urgently necessary step in the program to promote economic recovery, I ask the Congress for legislation to protect small Home Owners from foreclosure and to relieve them of a portion of the burden of excessive interest and principal payments incurred during the period of higher values and higher earning power. Implicit in the legislation which I am suggesting to you is a declaration of national policy. This policy is that the broad interests of the Nation require that special safeguards should be thrown around home ownership as a guaranty of social and economic stability, and that to protect home owners from inequitable enforced liquidation, in a time of general distress, is a proper concern of the Government."

The statute is an emergency measure, highly remedial in character, with the purpose of extending the greatest measure of relief to home owners. It was an integral part of a comprehensive program enacted at the first session of the 73rd Congress and intended as a broad grant of aid.

The committee reports of Congress further demonstrate the national emergency purpose of the act. (See House Report No. 55, Senate Report No. 91, House Report No. 210, 73rd Congress, 1st Session.)

By the terms of the Act, the bonds of the corporation are exempt, both as to principal and interest, from all Federal, State, Municipal and local taxation (except surtaxes, inheritance, estate and gift taxes), and no taxes may be imposed on the Corporation, its franchise, capital, reserves and surplus, nor upon its loan and income, except that its real property is subject to taxation as other real property is taxed.

The Act was intended to supplement the Home Loan Bank System, by setting up a governmental agency to provide direct relief to home owners.

The Congress determined that the preservation of the ownership of homes was conducive to the general welfare; that home ownership, as a national objective, would be permanently injured if the thousands of foreclosures then being prosecuted should continue; that home owners should not be subject to the vicissitudes of the general money market; and that, if confidence in realty values were not restored, the credit of hundreds of towns and cities, dependent upon the collection of taxes, would be permanently injured; and that granting loans to assist owners in retaining title to their homes was a proper national emergency purpose essential to the general welfare.

The Corporation was formed to carry on this emergency refinancing, its operations being closely circumscribed by statute.

The organization, scope, functions and operations of the Home Owners' Loan Corporation are described in great detail in the Government brief on file in this Court in the case of *Kay v. United States*, 82 Law Ed. Adv. Op. 418, and need not be described here in order to demonstrate the national public purposes of the Corporation.

The Corporation was not created to compete with private enterprise, but on the contrary, it was formed to rescue home ownership and private business in a national catastrophe.

It is apparent that the provision of relief for distressed home owners cannot be considered competition with private business, for in the promotion of the general welfare, it fosters and encourages all enterprise.

The statutory refunding operations of this corporation cannot be said to partake of the nature of any private business or to compete with private enterprise, for whenever did or could private capital undertake the making of hazardous loans to poor risks (distressed persons). The corporation was organized and operated in a national emergency at a time when the only power that saved the people of the United States from disaster was their government and the measures taken by their government to alleviate the national distress.

In taxing and making appropriations for the general welfare, Congress is not confined within the scope of the delegated powers but must merely act in furtherance of general or national as distinguished from local purposes. *U. S. v. Butler*, 297 U. S. 1, 65.

If the national public purposes of the Act are within the powers conferred upon Congress by the Constitution, then it is plain that the said Act is constitutional and the Home Owners' Loan Corporation is an instrumentality of the United States, lawfully created and used by it to carry into effect its constitutional powers.

United States v. Butler, supra;

Charles C. Steward Mach. Co. v. Davis, 301 U. S. 548;

Helvering v. Davis, 301 U. S. 619.

Within the principle laid down in these cases, the purposes of the Home Owners' Loan Act of 1933 are plainly national and a public purpose for which the public funds may be expended to promote the general welfare.

This Court recognized the national public interest in the maintenance of home ownership and well noted the severity of the economic crisis which we have but briefly described.

Green v. Frazier, 253 U. S. 223;

Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398;

Block v. Hirsh, 256 U. S. 135.

Congress has the power to judge what fiscal agencies the Government needs. Its decision of that question is not open to judicial review. Therefore, Congress, at its discretion, may create a moneyed or credit institution such as the Home Owners' Loan Corporation, equipped to provide a market, as stated in the act, for the obligations of the United States.

Congress alone has the right to judge as to the *degree of necessity* which exists for creating banks or other governmental fiscal agencies.

It is immaterial that the Home Owners' Loan Corporation is not a bank. For, in passing upon and upholding the power of Congress to create Federal Land Banks and Joint Stock Land Banks, in the case of *Smith v. Kansas City Title Co.*, 225 U. S. 180, the Supreme Court said:

"* * * whether technically banks, or not, these organizations may serve the governmental purposes declared by Congress in their creation. * * *"

If, during an emergency period, the Federal Government exercises functions, derived from its delegated powers,

which it does not find necessary to exercise under normal conditions, it is not departing from the constitutional principles which are the basis of its existence.

This means that our constitutional government has the power of expanding to fit the conditions of any circumstances which might arise.

This Court has said: "The government within the Constitution has all the powers granted to it, which are necessary to preserve its existence * * *." *Ex Parte Milligan*, 4 Wall. 71. And again: "It is not lightly to be assumed that in matters requiring national action, a power which must belong to and somewhere reside in every civilized government is not to be found." *Andrews v. Andrews*, 188 U. S. 14; *Missouri v. Holland*, 252 U. S. 433. And, in another case "Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern." *Block v. Hirsch*, *supra*. And, in still another: "* * * Although an emergency may not call into life a power which has never lived, nevertheless an emergency may afford a reason for the exertion of a living power already enjoyed." *Wilson v. New*, 243 U. S. 332.

An emergency does not create power or increase granted power, or remove or diminish the restrictions imposed upon power granted or reserved, but emergency may furnish the occasion for the exercise of power.

POINT II.

The functions and activities of the Home Owners' Loan Corporation are not proprietary.

The contention to the contrary disregards the conditions which existed when the Home Owners' Loan Act was enacted and the general national purpose of the Act. It overlooks the necessity, arising out of the three-year emergency re-funding operation, to service the mortgages so acquired in the emergency. Disregarding the comprehensive governmental functions which the Corporation discharged in the relief refinancing, and still performs, it looks only to activities which are subordinate to the main purpose of the Act and the Corporation.

Subordinate activities will not destroy the authority of Congress to create this Corporation.

Osborn v. United States Bank, 9 Wheat. 738 at 860;

United States v. Chandler-Duabur, 229 U. S. 53 at 73.

The United States, being exclusively a government of delegated power, has no authority under the Constitution to engage in any form of private business except as an appropriate means of serving a national public interest.

Van Brocklin v. Tennessee, 117 U. S. 151, 155, 158.

The United States being a government which can exercise only those powers derived from the Constitution and not prohibited by it, all of its activities necessarily constitute governmental functions.

McCulloch v. Maryland, 4 Wheaton 316;
United States v. Cruikshank, 92 U. S. 542;
Baltimore National Bank v. State Tax Commission
of Maryland, 297 U. S. 209.

In *Kay v. U. S.*, *supra*, the defendant charged with violation of the Home Owners' Loan Act, asserted that the statute was invalid. The decision held there was no occasion to consider this broad question, but, in the course of the decision, this Court emphasizes the public governmental character of the corporation and its officers, and states:

"* * * When one undertakes to cheat the Government or to mislead its officers, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction."

The Court in that case also held that the regulations of the Board of Directors of the Corporation, made pursuant to the Act, could be enforced under the penal provisions of the Act and in that connection the decision states:

"* * * * Meanwhile, the governmental operations go on, and public funds and public transactions require the protection which it was the aim of these penal provisions to secure, whatever might be the ultimate determination as to the validity of the enterprise."

When Congress determined to further exercise its authority to act in this field and created the Federal Savings and Loan Insurance Corporation, it provided by Section 204 B of the Federal Housing Act of 1934 (National Housing Act, 48 Stat. 1257, 12 U. S. C. A. Section 1726) that the Home Owners' Loan Corporation be authorized and directed to subscribe for all the stock of the insurance corporation and make payment therefor with bonds of the Corporation.

This use of the instrumentality further demonstrates the national public purposes of the Corporation. Congress, by this and other legislation, subjected the corporation and its bonds to the authority and direction of Congress. Implicit in such action is the determination that the funds of the Corporation are public funds available for public use.

Under the Home Owners' Loan Act, of 1933, the Treasury was directed to subscribe to the shares of Federal Savings and Loan Associations as part of the permanent home financing system. By subsequent Acts, the Home Owners' Loan Corporation was directed to perform the function first allotted to the Treasury (48 Stat. 128-129; 49 Stat. 293, 296). We point to this as further evidence of the disposition of Congress to use this public corporation and government instrumentality for general national and public purposes.

In *Baltimore National Bank v. State Tax Commission of Maryland*, *supra*, this Court expressed itself respecting the character of the Reconstruction Finance Corporation, as follows:

"The Reconstruction Finance Corporation was organized in 1932 to give relief to financial institutions in a national emergency and for other and kindred ends. Act of January 22, 1932, 47 Stat. 5, act of July 21, 1932, 47 Stat. 709, 15 U. S. C. c. 14 (see 15 U. S. C. A., Sec. 601, et seq.). At the time of its creation and continuously thereafter the United States has been and is the sole owner of its shares. The purpose that it has aimed to serve is not profit to the government, though profit may at times result from one or more of its activities. The purpose to be served is the rehabilitation of finance and industry and commerce, threatened with prostration as the result of the great depression. We assume, though without deciding even by indirection, that within *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, a corporation so conceived and operated is an instrumentality of government without distinction in that regard between one activity and another."

POINT III.

The authority of the United States to create and use a corporation as its instrumentality to carry into effect its constitutional powers, is founded on and implied from the aggregate of all the powers conferred upon it in the Constitution.

If the instrumentality created and used by Congress to carry into effect its constitutional powers is adapted to aid it in exercising those powers, the Courts will not question or review the decision of Congress in creating and using the instrumentality. *People ex rel. Rogers v. Graves*, 299 U. S. 401.

In *People ex rel. Rogers v. Graves*, *supra*, the Court said :

“The power of the Federal government to use a corporation as a means to carry into effect the substantive powers granted by the Constitution has never been doubted since *McCulloch v. Maryland*, 4 Wheat, 316.”

The Home Owners' Loan Corporation is an agency created, owned and controlled by the United States to enable it to perform a governmental function.

The creation and operation of Home Owners' Loan Corporation is a governmental function well within the constitutional powers of Congress.

In creating this governmental agency and investing it with the broad and comprehensive national functions, Congress relied on its power to borrow and appropriate public money. The power “to borrow money on the credit of the United States” is granted without express limitations (Clauses 2, 8, Constitution; *Juilliard v. Greenman*, 110 U. S. 421).

The power to borrow can be subject to no greater 'imitation than that in its exercise Congress act in furtherance of general or national as distinguished from local purposes.

By the use of Home Owners' Loan Corporation bonds, guaranteed by it, the United States uses this instrumentality to borrow money in furtherance of general or national as distinguished from local purposes.

The allegedly local character of the welfare which is promoted by the Home Owners' Loan Corporation seems to consist merely in the fact that the home owner is a single individual, who is benefited with respect to his real property, immovably fixed to a single place. The objection does not detract from the national interest in home ownership because there can be no general welfare which is not an aggregation of individual welfares.

Congress might have determined that the government, through an administrator, carry on this emergency refunding by an exchange of government bonds for home mortgages. Congress, however, decided to use the corporation as an instrumentality or agency and to issue for the same public purposes the bonds of the corporation bearing a guarantee by the United States. Thus the corporation is the United States.

Congress regularly appropriates funds and the United States sells bonds for cash as a normal operation. Through the instrumentality of the Home Owners' Loan Corporation it issued its obligations for the public purpose, taking mortgages in exchange therefor.

Indeed, in *Commonwealth ex rel. Kelly v. Rouse*, 163 Va. 845, 178 S. E. 37, where Rouse was employed as District Counsel for the Home Owners' Loan Corporation, the Supreme Court of Appeals of Virginia remarked:

"It, therefore, appears from the provisions of the Act that this Corporation was created as 'an instrumentality of the United States' solely for the purpose.

of setting up a governmental agency whereby the United States Government itself might provide direct relief to home owners. In the opinion of the Attorney General hereinbefore referred to (written opinion given by the Attorney General of the United States to the President dated August 22, 1933), he further said: 'this review of the statutory provision discloses that the Home Owners' Loan Corporation is, in everything but form, a bureau or department of the Federal Government. It is regulated by Federal officials; all of its capital stock is furnished by the Government; it is given free use of the mails'.

"In view of the purposes and provisions of the Act, as above noted, we do not think there can be any doubt that Rouse's employment as attorney for the Home Owners' Loan Corporation is under the Government of the United States * * *."

POINT IV.

The Home Owners' Loan Corporation being a wholly-owned instrumentality of the United States, lawfully created and used by it to carry into effect its constitutional powers, it is immune from State taxation except as Congress may specifically consent to such taxation.

The principle that the instrumentalities of the United States, lawfully created and used by it to carry into effect its constitutional powers, are immune from State taxation, is firmly established.

McCulloch v. Maryland, supra;

Dobbins v. The Commissioners of Erie County, 16 Pet. 435;

Indian Motorcycle Co. v. United States, 283 U. S. 570.

The immunity rests upon an entire absence of the power to tax.

Johnson v. Maryland, 254 U. S. 151;

Long v. Rockwood, 277 U. S. 142;

People ex rel. Rogers v. Graves, *supra*.

The Home Owners' Loan Corporation, being a wholly-owned instrumentality of the United States, lawfully created and used by it to carry into effect its constitutional powers, it is immune from State taxation.

POINT V.

The Home Owners' Loan Corporation being immune from State taxation, the fixed salaries paid to its employees, in their capacity as such, are also immune from State taxation.

The rule is well established that the instrumentalities of the United States, lawfully created and used by it to carry into effect its constitutional powers, being immune from State taxation, the fixed salaries paid to its employees, in their capacity as such, are also immune from State taxation.

Dobbins v. Commissioners of Erie County, *supra*;

Indian Motorcycle Co. v. United States, *supra*;

People ex rel. Rogers v. Graves, *supra*;

Johnson v. Maryland, 254 U. S. 51;

Long v. Rockwood, 277 U. S. 142.

In *People ex rel. Rogers v. Graves*, *supra*, after holding that the Panama Railroad Company, by which the relator was employed, was a wholly-owned instrumentality of the

United States lawfully used by it to carry into effect its constitutional powers, and therefore immune from State taxation, the Court said:

"The railroad company being immune from state taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune.

In *Dobbins v. The Commissioners of Erie County*, 16 Pet. 435, 448-449, this court held that a state was without authority to tax the instruments, or compensation of persons, which the United States may use and employ as necessary and proper means to execute its sovereign power. The rule is well established; and the reasons upon which it is based and the authorities sustaining it have been so recently reviewed by this Court, *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 575, et seq., that further discussion is unnecessary."

The Attorney General of New York argues that a new rule was enunciated in the case of *Helvering v. Gerhardt*, 82 Law. Ed. Adv. Ops. 962, holding that the burden of a tax on employees is speculative and uncertain and therefore he concludes that this Court has ended all employee immunity.

This conclusion is not supported by that decision. The Court in that connection referred to cases interpreted at footnote 6 and stated that those cases establish principles of limitation for immunity of State instrumentalities and mark the boundaries of State immunity. This Court evidences a fixed purpose to limit the decision to the question of immunity for State instrumentalities. This appears from the reference in footnote 7 to *James v. Dravo*, 302 U. S. 134, emphasizing an exceptional class of cases where limitation was placed upon the immunity of contractors doing business with the Federal Government.

In *James v. Dravo, supra*, the Court emphasizes that the tax in question was not laid upon the Government or its property or officers nor was it laid upon an instrumentality of the United States.

And after reviewing many cases, the Court said:

"These decisions show clearly the effort of the Court in this difficult field to apply the practical criterion to which we referred in *Willcutts v. Bunn, supra*, and again in *Graves v. The Texas Company, supra*."

In the *Panama Canal* case (*People ex rel. Rogers v. Graves, supra*), this Court held squarely that an income tax upon an employee's salary is a direct burden on the Government, and counsel respectfully suggests that this was the considered judgment of the Court having in mind the decision in *Willcutts v. Bunn*, 282 U. S. 216, from which we quote an excerpt from page 225:

"Where no direct burden is laid upon the Government instrumentality and there is only a remote, if any, influence upon the exercise of the function of government * * *."

If the employee is taxable then the instrumentality is taxable, and the instrumentality can only be taxable because it is an unconstitutional activity of the Federal Government. If this conclusion were reached then the bonds of the Corporation would be taxable, and by the same token, the guarantee of the principle and interest of the bonds by the United States would be unconstitutional and void.

POINT VI.

Whether or not the burden of the tax upon the respondent's salary be speculative or uncertain, the State of New York has exempted it from State taxation by the Tax Law of the State of New York.

Section 359, Paragraph 2-f of the Tax Law of the State of New York excludes from gross income:

"Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States."

There is no reason to assume that the Legislature of the State of New York intended to differentiate between the employees in the departments of the Government and those in the wholly owned instrumentalities of the Government.

While we insist that respondent's salary is constitutionally immune, nevertheless, inasmuch as the Home Owners' Loan Corporation is but the means by which the United States acts, the salary is received from the United States and is expressly exempt by the New York statute.

See:

Commonwealth of Virginia ex rel. Kelly v. Rouse,
supra.

POINT VII.

The immunity of Federal instrumentalities rests on a different basis from that of State instrumentalities.

A federal function must be exercised in a governmental capacity—a delegated power exercised through an appropriate means—otherwise it becomes a mere usurpation in defiance of the law. Granted that the power exists and that the means are appropriate then the immunity is complete.

The boundaries of State immunity are such that the functions shall be traditionally usual and essential.

But, by any test, we have demonstrated that the functions of the Home Owners' Loan Corporation are clearly governmental and are not in the "zone of debatable ground". (*Brush v. Commissioner*, 300 U. S. 352.)

In briefing the question here presented, petitioners regard the States and the Federal Government upon a parity with each other. That is not the position of this Court (*McCulloch v. Maryland*, *supra*), as restated in *People ex rel. Rogers v. Graves* (*supra*), and asserted with great emphasis in *Helvering v. Gerhardt* (*supra*).

In *McCulloch v. Maryland*, the Court recognizes a clear distinction between the extent of the power of a state to tax National agencies and that of the National Government to tax State instrumentalities.

Helvering v. Gerhardt, *supra*.

The immunity of Federal instrumentalities from State taxation rests on a different basis from that of State instrumentalities.

Helvering v. Gerhardt, footnote 1, *supra*;
McCulloch v. Maryland, *supra*.

The basis upon which constitutional tax immunity of a State has been supported is the protection which it affords to the continued existence of the State.

Helvering v. Gerhardt, supra.

The boundaries of State immunity have been marked.

Helvering v. Gerhardt, supra.

The State immunity has been narrowly restricted to those State functions without which a State could not continue to exist as a governmental entity.

Helvering v. Gerhardt, supra.

The very nature of our Federal system imposes a limitation on State immunity from taxation.

Helvering v. Gerhardt, supra.

The State immunity from National taxing power was narrowly limited.

Collector v. Day, 11 Wall. 113;

Helvering v. Gerhardt, footnote 6, supra.

The exercise of the National taxing power is subject to a safeguard which does not operate where a State undertakes to tax a National instrumentality.

Helvering v. Gerhardt, footnote 2, supra.

Federal instrumentalities are immune from non-discriminatory State taxation.

Weston v. Charleston, 2 Pet. 449;

Dobbins v. Erie County, supra;

Helvering v. Gerhardt, footnote 3, supra.

POINT VIII.

The issues in this case have been settled by decisions of this Court.

The questions involved in this case have been settled.

The fundamental doctrine that the instrumentalities of the United States are immune from State taxation must be conceded and the corollary, that the income derived from such instrumentalities is also immune, has been adjudicated by this Court.

People ex rel. Rogers v. Graves, supra.

We challenge the assertion of the Attorney General of New York picturing consequences which may ensue in preserving the Federal immunity.

While some powers are divided between National and State Governments, nevertheless the United States is sovereign with regard to the objects of the powers delegated to the United States, and as to all such powers and their objects the United States has plenary authority.

The Attorney General for New York professes curiosity to know whether this Court in *Helvering v. Gerhardt, supra*, enunciated entirely new rules in regard to immunity of employees from income tax upon their salaries.

This Court confined its decision in the case *Helvering v. Gerhardt, supra*, with the statement:

“* * * we decide only that the present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state government.”

The present inquiry should not be extended to satisfy a curiosity to know if this Court will formulate a general test which might embarrass the decision of cases in respect of activities of a different kind which may arise in the future. (*Brush v. Commissioner of Internal Revenue, supra.*)

Respondent respectfully requests that this case be confined to the immediate question here involved.

CONCLUSION.

Because the Attorney General of New York feels that a new rule has been enunciated in the case of *Helvering v. Gerhardt*, this Respondent should not be drawn into issues looking toward a re-examination of the doctrine of immunity or into a discussion as to whether this Court agrees with the interpretation of its decision contained in the study of "Taxation of Government Bondholders and Employees", referred to in Petitioners' Brief, page 16.

If the Court should grant the instant petition, counsel respectfully suggest that it be limited to the question decided by the court below.

We respectfully submit that the application for the writ of certiorari should be denied.

November 21st, 1938.

DANIEL MCNAMARA, JR.,
Solicitor for Respondent.

LUKE E. KEELEY,
ERNEST K. NEUMANN,
GEORGE A. FURNESS,
of Counsel.

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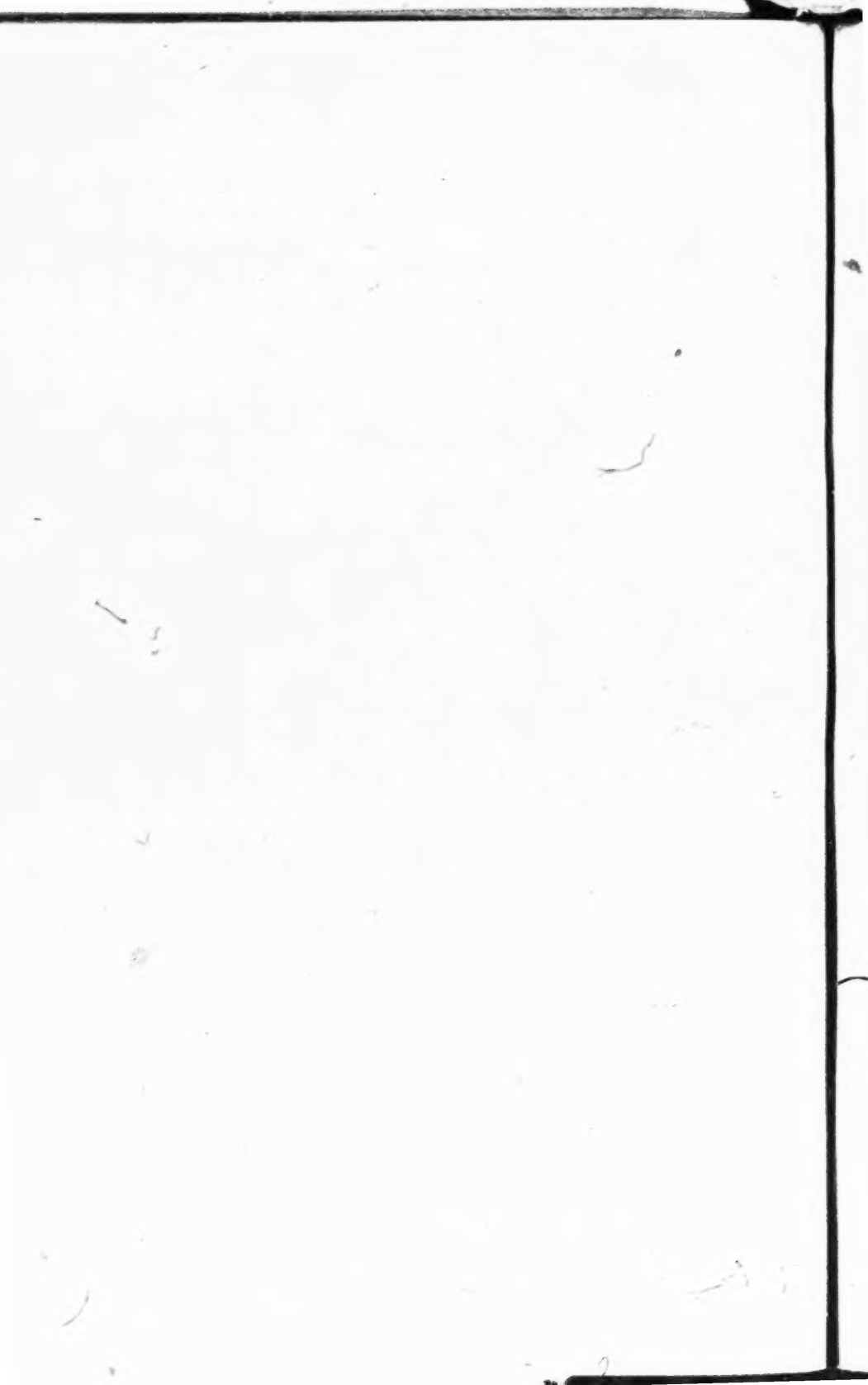
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CHARLES ELMORE GROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 478

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSY as
Commissioners constituting the State Tax Commission of
the State of New York,

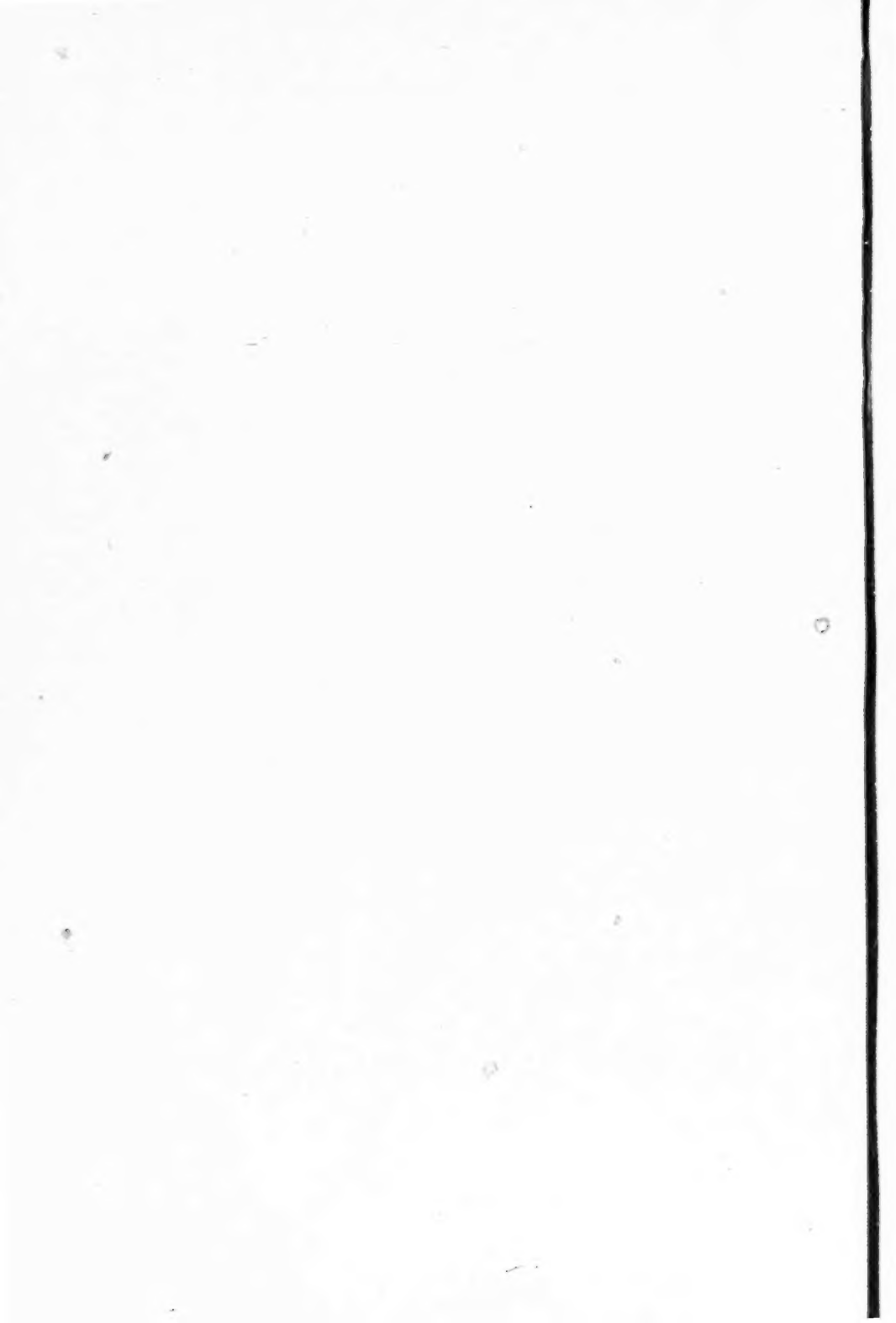
Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK, upon the relation of
JAMES B. O'KEEFE,
on Certiorari to the Supreme Court of the
State of New York.

BRIEF FOR RELATOR

✓ DANIEL MCNAMARA, JR.,
Solicitor for Relator,
Brooklyn, New York.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1938.

No. 478

MARK GRAVES, JOHN J. MERRILL
and JOHN P. HENNESSY as Com-
missioners constituting the
State Tax Commission of the
State of New York,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF
NEW YORK upon the relation
of JAMES B. O'KEEFE,

BRIEF FOR RELATOR.

JAMES B. O'KEEFE, a resident of New York, was regularly employed during the year 1934, by the Home Owners' Loan Corporation at a fixed salary. He made a personal income tax return pursuant to law and paid a tax of \$57.28 based on his earnings of \$2,246.66 at a fixed salary from the Home Owners' Loan Corporation for the year 1934. Thereafter, he applied for a refund of the tax upon the ground that the salary earned by him as an employee of the Home Owners' Loan Corporation was specifically exempt by the Tax Law of New York from the tax because it was earned by him

as an employee of the United States, and upon the further ground that the salary so earned by him was immune from such tax because the Home Owners' Loan Corporation is an instrumentality of the United States.

The application for refund was denied. That determination was reviewed and annulled. By final order and judgment of the Supreme Court of the State of New York entered after decision by the Court of Appeals, that conclusion was affirmed.

The Question Presented.

Whether the fixed salary paid to respondent as a regular employee of the Home Owners' Loan Corporation is subject to income tax imposed by the State of New York?

Statutes Involved.

Section 359 of the Tax Law of the State of New York.
Home Owners' Loan Act of 1933; Chapter 64, 48 U. S. Stat. at large, 128.

POINT I.

The functions of the Home Owners' Loan Corporation are essential to the preservation of the general welfare and the promotion of economic security.

The title of the act expresses the national emergency purpose which prompted the creation of the instrumentality. It is entitled:

"An act to provide emergency relief with respect to home-mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize

their debt elsewhere, to amend the Federal Home Loan Bank Act, to increase the market for obligations of the United States, and for other purposes."

The President in his message to Congress on April 13th, 1933, recommending this legislation, said, in part:

"As a further and urgently necessary step in the program to promote economic recovery, I ask the Congress for legislation to protect small Home Owners from foreclosure and to relieve them of a portion of the burden of excessive interest and principal payments incurred during the period of higher values and higher earning power. Implicit in the legislation which I am suggesting to you is a declaration of national policy. This policy is that the broad interests of the Nation require that special safeguards should be thrown around home ownership as a guaranty of social and economic stability, and that to protect home owners from inequitable enforced liquidation, in a time of general distress, is a proper concern of the Government."

The statute is an emergency measure, highly remedial in character, with the purpose of extending the greatest measure of relief to home owners. It was an integral part of a comprehensive program enacted at the first session of the 73rd Congress and intended as a broad grant of aid.

The committee reports of Congress further demonstrate the national emergency purpose of the act. (See House Report No. 55, Senate Report No. 91, House Report No. 210, 73rd Congress, 1st Session.)

The Act was intended to supplement the Home Loan Bank System, by setting up a governmental agency to provide direct relief to home owners.

The crisis prompted Congress to exercise its fiscal power and the power to spend for the "general welfare."

The Congress determined that the preservation of the ownership of homes was conducive to the general welfare; that home ownership, as a national objective, would be permanently injured if the thousands of foreclosures then being prosecuted should continue; that home owners should not be subject to the vicissitudes of the general money market; and that, if confidence in realty values were not restored, the credit of hundreds of towns and cities, dependent upon the collection of taxes, would be permanently injured; and that granting loans to assist owners in retaining title to their homes was a proper national emergency purpose essential to the general welfare.

The Corporation was formed to carry on this emergency refinancing, its operations being closely circumscribed by statute.

By the terms of the Act, the bonds of the corporation are exempt, both as to principal and interest, from all Federal, State, Municipal and local taxation (except surtaxes, inheritance, estate and gift taxes), and no taxes may be imposed on the Corporation, its franchise, capital, reserves and surplus, nor upon its loans and income, except that its real property is subject to taxation as other real property is taxed.

The description of the emergency and of the organization, scope, functions and operations of the Home Owners' Loan Corporation contained in the Government brief on file in this Court in the case of *Kay v. United States*, 303 U. S. 1, establishes the national public purposes of the Corporation.

The Corporation was not created to compete with private enterprise, but on the contrary, it was formed to rescue home ownership and private business in a national catastrophe.

It is apparent that the provision of relief for distressed home owners cannot be considered competition with private business, for in the promotion of the general welfare, it fosters and encourages all enterprise.

The statutory refunding operations of this Corporation cannot be said to partake of the nature of any private business or to compete with private enterprise, for whenever did or could private capital undertake to refinance home mortgages, to extend relief to the owners of homes who were in default and unable to refinance their home mortgage debt—in other words, the making of hazardous loans to distressed persons.

The corporation was organized and operated in a national emergency at a time when the Government of the United States was the only power that could save the people of the United States from disaster through measures taken by Congress to alleviate the national distress.

The Home Owners' Loan Corporation is a legitimate instrumentality of the United States, created and used by it to perform national public governmental functions to promote the general welfare.

United States v. Butler, 297 U. S. 1;

Charles C. Steward Mach. Co. v. Davis, 301 U. S. 548;

Helvering v. Davis, 301 U. S. 619.

Within the principle laid down in these cases, the purposes of the Home Owners' Loan Act of 1933 are plainly national and a public purpose for which the public funds may be expended to promote the general welfare.

This Court recognized the public interest in the maintenance of homes.

Green v. Frazier, 253 U. S. 233;

Block v. Hirsh, 256 U. S. 135.

It noted the severity of the economic crisis which we have but briefly described.

Home Building and Loan Association v. Blaisdell,
290 U. S. 398.

The Home Owners' Loan Corporation is an agency created, owned and controlled by the United States to enable it to perform governmental functions.

The creation and operation of Home Owners' Loan Corporation is a governmental function well within the constitutional powers of Congress.

By the use of Home Owners' Loan Corporation bonds, guaranteed by it, the United States uses this instrumentality to borrow money in furtherance of general or national as distinguished from local purposes.

The allegedly local character of the welfare which is promoted by the Home Owners' Loan Corporation seems to consist merely in the fact that the home owner is a single individual, who is benefited with respect to his real property, immovably fixed to a single place. The objection does not detract from the national interest in home ownership because there can be no general welfare which is not an aggregate of individual welfares.

In creating this governmental agency and investing it with the broad and comprehensive national functions, Congress relied on its power to borrow and appropriate public money. The power "to borrow money on the credit of the United States" is granted without express limitations (Clauses 2, 8, Constitution; *Juilliard v. Greenman*, 110 U. S. 421).

By the use of Home Owners' Loan Corporation bonds, guaranteed by it, the United States uses this instrumentality to borrow money.

The power to borrow can be subject to no greater limitation than that, in its exercise, Congress act in furtherance of general or national as distinguished from local purposes.

Congress might have determined that the government, through an administrator, carry on this emergency refunding by an exchange of government bonds for home mortgages. Congress, however, decided to use the corporation

as an instrumentality or agency and to issue for the same public purposes the bonds of the corporation bearing a guarantee by the United States.

The corporation has no purpose of its own. Freedom of corporate action or power of control is mere fiction. All of its acts are directed and controlled by the United States through public officers (Point VI).

Congress regularly appropriates funds and the United States issues bonds for cash as a normal operation. Through the instrumentality of the Home Owners' Loan Corporation it issued its obligations for the public purpose, taking mortgages in exchange therefor.

Congress has the power to judge what fiscal agencies the Government needs. Its decision of that question is not open to judicial review. Therefore, Congress, at its discretion, may create an agency such as the Home Owners' Loan Corporation, equipped to provide a market, as stated in the act, for the obligations of the United States.

Congress alone has the right to judge as to the degree of necessity which exists for creating welfare and fiscal agencies.

The national authority over credit, finance and currency is derived from the aggregate of all the powers granted to Congress.

Norman v. B. & O. Railroad Company, 294 U. S. 240 at 303.

The creation of the Banks of the United States was sustained not only because of the support to the financial operations of the Government but, among other things, by reason of their relation to the general commerce and credit of the United States.

McCulloch v. Maryland, 4 Wheat. 316;

Osborn v. Bank of the United States, 9 Wheat. 738.

And other banking functions were sustained on that authority for those reasons.

First National Bank v. Fellows ex rel. Union Trust Co., 244 U. S. 416, 419;

Smith v. Kansas City Title & Trust Co., 255 U. S. 180.

It is immaterial that the Home Owners' Loan Corporation is not a bank. For, in passing upon and upholding the power of Congress to create Federal Land Banks and Joint Stock Land Banks, in the case of *Smith v. Kansas City Title Co.*, 225 U. S. 180, the Supreme Court said:

"* * * whether technically banks, or not, these organizations may serve the governmental purposes declared by Congress in their creation. * * *

If, during an emergency period, the federal government exercises functions, derived from its delegated powers, which it does not find necessary to exercise under normal conditions, it is not departing from the constitutional principles which are the basis of its existence.

This means that our constitutional government expands its functions to fit the conditions of any circumstances which might arise.

The economic interests of the nation justify the exercise in this emergency of every function available to the Government under its continuing and dominant protective power.

This Court has said: "The government within the Constitution has all the powers granted to it, which are necessary to preserve its existence * * *." *Ex Parte Milligan*, 4 Wall. 71. And again: "It is not lightly to be assumed that in matters requiring national action, a power which must belong to and somewhere reside in every civilized government is not to be found." *Andrews v. Andrews*, 188 U. S. 14; *Missouri v. Holland*, 252 U. S. 433. And, in another

case "Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern." *Block v. Hirsch, supra*. And, in still another: "* * * Although an emergency may not call into life a power which has never lived, nevertheless an emergency may afford a reason for the exertion of a living power already enjoyed." *Wilson v. New*, 243 U. S. 332.

An emergency does not create power to use instrumentalities, but emergency may furnish the occasion for the exercise of power.

"Governmental functions are not to be regarded as non-existent because they are held in abeyance, or because they lie dormant, for a time. If they be by their nature governmental, they are none the less so because the use of them has had a recent beginning."

Brush v. Commissioner, 300 U. S. 352.

The functions and activities of the Home Owners' Loan Corporation are not proprietary.

Subordinate activities will not destroy the authority of Congress to create this corporation.

Ashwander v. T. V. A., 297 U. S. 288, at 333;

Osborn v. United States Bank, supra, at 860;

United States v. Chandler-Dunbar, 229 U. S. 53 at 73;

People ex rel. Rogers v. Graves, 299 N. Y. 401, at 408.

The United States, being exclusively a government of delegated power, has no authority to engage in any form of private business except as an appropriate means of serving a national public interest.

Van Brocklin v. Tennessee, 117 U. S. 151, 155, 158.

A federal function must be exercised in a governmental capacity—a delegated power exercised through an appropriate means—otherwise it becomes a mere usurpation in defiance of the law.

The United States being a government which can exercise only those powers derived from the Constitution and not prohibited by it, all of its activities necessarily constitute governmental functions.

McCulloch v. Maryland, supra;
United States v. Cruikshank, 92 U. S. 542.

In the case of *Osborn v. U. S. Bank, supra*, the Court said of the Bank:

“It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation.”

In *Kay v. U. S., supra*, the defendant charged with violation of the Home Owners' Loan Act, asserted that the statute was invalid. The decision held there was no occasion to consider this broad question, but, in the course of the decision, this Court emphasizes the public governmental character of the corporation and its officers, and states:

“* * * When one undertakes to cheat the Government or to mislead its officers, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.”

The Court in that case also held that the regulations of the Corporation, made pursuant to the Act, could be enforced under the penal provisions of the Act and in that connection the decision states:

“* * * Meanwhile, the governmental operations go on, and public funds and public transactions re-

quire the protection which it was the aim of these penal provisions to secure, whatever might be the ultimate determination as to the validity of the enterprise."

When Congress determined to further exercise its authority in the home financing field and created the Federal Savings and Loan Insurance Corporation, it provided by Section 204 B of the Federal Housing Act of 1934 (National Housing Act, 48 Stat. 1257, 12 U. S. C. A. Section 1726) that the Home Owners' Loan Corporation be authorized and directed to subscribe for all the stock of the insurance corporation and make payment therefor with bonds of the Corporation.

This use of the instrumentality further demonstrates the national public purposes of the Corporation. Congress, by this and other legislation, subjected the corporation and its bonds to the authority and direction of Congress. Implicit in such action is the determination that the funds of the Corporation are public funds available for public use.

Under the Home Owners' Loan Act, of 1933, the Treasury was directed to subscribe to the shares of Federal Savings and Loan Associations as part of the permanent home financing system. By subsequent Acts, the Home Owners' Loan Corporation was directed to perform the function first allotted to the Treasury (48 Stat. 128-129; 49 Stat. 293, 296). We point to this as further evidence of the determination of Congress to use this public corporation and government instrumentality for general national and public purposes.

Congress has the power to provide funds and spend for the general welfare. It may create a corporation to perform that function. The description of the economic conditions prevailing before and after the enactment of the Home Owners' Loan Act of 1933 demonstrates that the relief for

home owners and financial institutions afforded by the Act was in aid of the general welfare and necessary to sustain the credit structure of the nation.

The objects of the welfare and fiscal powers are just as closely knit into the fabric of our national government as the object of the defense powers, and the functions performed by the Home Owners' Loan Corporation are just as necessary to the preservation of the general welfare and the promotion of economic security as the Panama Railroad is to the national defense.

People ex rel. Rogers v. Graves, supra;
United States v. Butler, supra;
Charles C. Steward Mach. Co. v. Davis, supra;
Helvering v. Davis, supra;
Clallam County v. United States, 263 U. S. 341.

The Home Owners' Loan Corporation is an agency created by Congress only to perform the bidding of Congress in matters essential to the preservation of the general welfare and the promotion of economic security.

POINT II.

A wholly-owned instrumentality of the United States, lawfully created and used to carry into effect constitutional powers, the Home Owners' Loan Corporation is immune from State taxation.

The principle that the instrumentalities of the United States, lawfully created and used by it to carry into effect its constitutional powers, are immune from state taxation is firmly established.

McCulloch v. Maryland, supra;
Dobbins v. The Commissioners of Erie County, 16
Pet. 435;

Van Brocklin v. Tennessee, supra;
Clallam County v. United States, supra;
New Brunswick v. United States, 276 U. S. 547.

The immunity rests upon an entire absence of the power to tax.

Johnson v. Maryland, 254 U. S. 151;
People ex rel. Rogers v. Graves, supra.

The State cannot by any form of taxation impose any burden upon a national power or function.

Weston v. Charleston, 2 Pet. 449;
Home Savings Bank v. Des Moines, 205 U. S. 503,
513.

Congress may enlarge the federal immunity if necessary to protect the performance of the functions of the national government.

James v. Dravo, 302 U. S. 134, at 160-61.

Although the Court in *Van Alen v. The Assessors*, 3 Wall. 573, at 585, suggested that Congress might curtail a federal immunity that might otherwise be implied, the Court, upon full consideration, in the case of *Home Savings Bank v. Des Moines, supra*, said:

"It may well be doubted whether Congress has the power to confer upon the state the right to tax obligations of the United States."

In the case of *Farmers Bank v. Minnesota*, 232 U. S. 516, the Court said:

"The supremacy of the Federal Constitution and the laws made in pursuance thereof and the entire independence of the Federal government from any control by the respective states, were the fundamental grounds of the (*McCulloch v. Maryland*) decision."

The Home Owners' Loan Corporation, being a wholly-owned instrumentality of the United States, lawfully created and used by it to carry into effect its constitutional powers, it is immune from state taxation.

POINT III.

The Home Owners' Loan Corporation being immune from taxation, the fixed salaries paid to its employees are also immune from State taxation.

Relator readily acknowledges the duty incumbent upon all men to contribute to the support of Government, but if a tax in respect of his compensation from a Federal instrumentality is prohibited by the Constitution, it can find no justification in the taxation of other income as to which there is no prohibition. Doing what the Constitution permits gives no license to do what it prohibits.

The immunity is not a private boon but is a limitation imposed in the public interest.

Evans v. Gore, 253 U. S. 245.

It is not to be applied restrictively but must be applied in accord with its spirit and the principle upon which it proceeds.

The instrumentalities of the United States, lawfully created and used by it to carry into effect its constitutional powers, being immune from state taxation, the fixed salaries paid to its employees, in their capacity as such, are also immune from state taxation.

Dobbins v. Commissioners of Erie County, *supra*;
People ex rel. Rogers v. Graves, *supra*;
Johnson v. Maryland, *supra*.

In *Dobbins v. Commissioners of Erie County, supra*, plaintiff held his office under the complicated machinery established by Congress to carry out its broad powers to regulate commerce and to lay and collect taxes, imposts, etc. All this legislation, says the Court, is a means necessary to an allowed end, and continues:

"If it can be taxed by a State as compensation, will not Congress have to graduate its amount with reference to its reduction by the tax? Could Congress use an uncontrolled discretion in fixing the amount of compensation, as it would do without the interference of such a tax? The execution of a national power by way of compensation to officers can in no way be subordinate to the action of the State Legislature upon the same subject."

As a practical matter Congress could not equalize federal salaries so as to offset the divers taxes that might be imposed by forty-eight states.

We further quote from the *Dobbins* case:

"To allow such a right of taxation to be in the States, would also in effect be to give the States a revenue out of the revenue of the United States, to which they are not constitutionally entitled, either directly or indirectly, neither by their own action, nor by that of Congress."

The salaries of employees and all administrative expenses of the Home Owners' Loan Corporation are fixed by Congress. The budget for personal services limits by "line appropriation" that part of the available funds to be expended for personal service. Congress recognizes that the Corporation can only act through individuals who must be compensated for their services. In this connection we quote again from the *Dobbins* case:

"The allowance is in its discretion. The presumption is that the compensation given by law is no more than the services are worth, and only such an amount as will secure from the officer the diligent performance of his duties. 'The officers execute their right of reaping from thence the recompense the services they may render may deserve', without that compensation being in any way lessened, except by the sovereign power from which the officer derived his appointment, or by another sovereign power to whom the first has delegated the right of taxation, in common with itself, for the benefit of both. Does not a tax, then, by a State upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entirety? It certainly has such an effect; and any law of a State imposing such a tax cannot be constitutional, because it conflicts with a law of Congress made in pursuance of the Constitution, and which makes it the supreme law of the land."

In *People ex rel. Rogers v. Graves, supra*, involving the employee of the Panama Railroad Company, the Court said, at page 404:

"The question therefore to be answered is whether the Canal is such an instrumentality of the Federal government as to be immune from State taxation, and, if so, are the operations of the Railroad Company so connected with the Canal as to confer upon the Company a like immunity?"

and having established the affirmative, the Court said, at page 408:

"The railroad company being immune from state taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune."

Implicit in this decision is the finding that an income tax upon an employee's salary is a direct burden on the government, and counsel suggests that this was announced on full consideration, the Court having in mind the practical criterion referred to in the decision in *Willcutts v. Bunn*, 282 U. S. 216, at 234.

In *Johnson v. State of Maryland*, *supra*, the plaintiff was an employee of the post-office department, driving a government truck. The Court, by Mr. Justice HOLMES, said:

"With regard to taxation, no matter how reasonable, or how universal and indiscriminating, the state's inability to interfere has been regarded as established since *McCulloch v. Maryland*, 4 Wheat. 316. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430) and that is the law today."

The decision in the case of *Helvering v. Gerhardt*, 304 U. S. 405, recognizes that there are many state employees remaining immune despite the fact that the tax affects the state only as the burden is passed on to it. The effect of this decision is to deny immunity when the burden of such taxation on the state is speculative and uncertain to the degree mentioned in that opinion.

If it were necessary to show the burden of state income tax on the Home Owners' Loan Corporation, that can readily be demonstrated.

The diverse provisions in the several states requiring information reports to be filed by the employer and provisions for withholding tax constitute a real burden and expense if the Corporation be required to conform thereto, and the physical labor involved in preparation of information returns will impair, impede and prejudice this governmental function.

National Bank v. Commonwealth of Kentucky, 9
Wall. 353, at 362.

In the latter case the Court says in part:

"The principle we are discussing has its limitation, * * *. That limitation is, that the agencies of the Federal Government are only exempted from state legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that Government."

The bonds of the Corporation, guaranteed as to principal and interest by the United States, bear a fixed interest rate. The revenue to service these bonds must be obtained from the interest accruing upon the mortgages taken by the Corporation, and any deficit must be supplied by the federal government. The state income tax compels consideration in determining salaries and would increase the operating expense of the Corporation.

In attempting to reflect the divers income taxes, an administrative agency is confronted with an impossible task in the matter of classification and equalization of salaries throughout an organization functioning in all the states of the Union, and this would constitute such a handicap as to compel the federal government to abandon the corporate form of agency or instrumentality and function directly in all fields.

To tax the salary is to tax the right of the Home Owners' Loan Corporation to employ the person, and is to levy upon the right of the person to work for the Corporation and receive the salary.

Income is to be distinguished from property. The income tax is not a tax of money in hand but is a tax on the right to receive the money.

The question here is one of power—not economics.

Home Savings Bank v. Des Moines, supra;
Evans v. Gore, supra.

The decision in *James v. Dravo, supra*, suggests that as a general rule, where a tax affecting an independent contractor be held not to impede a governmental function, nevertheless it holds Congress might enlarge the immunity to protect the function in the face of a specific tax so excessive as to be deemed an impediment.

Helvering v. Gerhardt, supra, Footnote 1.

The last sentence of this footnote states:

"Congress may curtail an immunity which might otherwise be implied (*Van Allen v. The Assessors*, 3 Wall., 573) or enlarge it beyond the point where, Congress being silent, the court would set its limits (*Bank v. Supervisors*, 7 Wall., 26, 30, 31; see *Thomson v. Pacific Railroad*, 9 Wall., 579, 588, 590; *Shaw v. Gibson-Zahniser Oil Corp'n*, 276 U. S. 575, 581, and cases cited; *James v. Dravo Contracting Co.*, 302 U. S., 134, 161)."

The principle set forth a century ago has never since been departed from. Upon this point we quote from the case of *Weston v. Charleston*:

"The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden upon the operations of the government. It may be carried to an extent which shall arrest them entirely."

We also quote from *McCallam v. Massachusetts*, 279 U. S. 620:

"A state tax, however small, upon such securities or interest derived therefrom, interferes or tends to interfere with the constitutional power of the general government to borrow money on the credit of the United States, and constitutes a burden upon the operations of government, and carried far enough would prove destructive."

The right to tax the salary of an employee of a federal instrumentality is of necessity an interference on the instrumentality, and since the extent of the interference depends upon the tax fixed by a state, it could be carried to an extent which would impede the operations of the federal agency or stop them entirely.

We again quote from *Weston v. Charleston*, *supra*:

"A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend; may be burdened, impeded, if not arrested, by any of the organized part of the confederacy."

Blind to the beneficent purpose of the Home Owners' Loan Act and the national welfare which it serves, a state might seek to impede, retard, impair or burden the operation of this appropriate means which Congress has adopted to exercise a delegated power. The end thus sought could be accomplished through taxation of the salaries of the employees of the Corporation, and this means, adopted by Congress in recognition of the national responsibility for the general welfare, could be impeded by taxation in every political subdivision in the Union.

POINT IV.

Congress has not consented to a State income tax on the salaries of employees of Home Owners' Loan Corporation, and such consent will not be implied.

The immunity exists unless Congress expressly consents to a tax.

The immunity need never be carried into express stipulation for this could add nothing to its force.

Evans v. Gore, supra.

The immunity from taxation rests upon an entire absence of the power to tax.

Helvering v. Gerhardt, supra.

In footnote 1 to this opinion, the Court cites an analogy between immunity from taxation and immunity from judicial process. It said:

"The analysis is comparable where the question is whether federal corporate instrumentalities are immune from state judicial process (Federal Land Bank v. Priddy, 295 U. S. 229, 234-235)."

Petitioners suggest that the Congress, by failure to specifically declare Home Owners' Loan Corporation salaries exempt, consents to taxation thereof.

"Immunity of corporate government agencies from suit and judicial process, and their incidents is less readily implied than immunity from taxation." (Federal Land Bank v. Priddy, *supra*.)

Since this Court has suggested that the questions are comparable, we point to the uniform decisions that the United States is not liable to suit except by express legislative consent.

United States v. Buchanan, 8 How. (49 U. S.) 83;
Gibbons v. United States, 8 Wall. (75 U. S.) 269;
German Bank v. United States, 148 U. S. 573;
Schillinger v. United States, 155 U. S. 163;
Bigby v. United States, 188 U. S. 400;
Basso v. United States, 239 U. S. 602;
United States v. Thompson, 257 U. S. 419;
Belknap v. Schild, 161 U. S. 10;
Peabody v. United States, 231 U. S. 530;
Russell v. United States, 182 U. S. 516.

A statute under which waiver of sovereign immunity is claimed must be strictly construed. Suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued. Courts cannot go beyond the letter of the statute and enlarge the liability beyond the requirements of the plain language of the statute.

Schillinger v. United States, *supra*;
Berdan v. United States, 156 U. S. 552;
Price v. United States, 174 U. S. 373;
Pine Hill Coal Co. v. United States, 259 U. S. 191;
Eastern Transportation Co. v. United States, 272
 U. S. 675;
United States v. Michel, 282 U. S. 656.

In the case of *Schillinger v. United States*, *supra*, at page 166, the Court said:

“Beyond the letter of such consent the Court may not go.”

In *United States v. Hoar*, 2 Mason, 311, at page 314, the Court said:

“Where the Government is not expressly or by necessary implication included, it ought to be clear

from the nature of the mischiefs to be redressed, or the language used, that the Government itself was in contemplation of the Legislature, before a court of law would be authorized to put such an interpretation upon any statute."

We have seen that the immunity of federal instrumentalities from suit is less readily implied than immunity from taxation and have observed the strict rule in regard to legislative consent.

The rule as to taxation is absolute in form and stricter in substance.

Although it became the practice after the Civil War for Congress to insert in appropriate acts the express exemption, the immunity, without the statute, is clear and conclusive.

The provision in the Home Owners' Loan Act:

"The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed."

can only be taken to evidence the measure of Congressional consent to taxation—it is, indeed, a forced construction of a provision designed to "consent to limitation of immunity" to read into the section a wider field than that specifically marked out.

A tax upon the salary of an employee of Home Owners' Loan Corporation is beyond the power of the State to levy and—what perhaps is of lesser moment—within the prohibition of the Home Owners' Loan Act above quoted.

Home Savings Bank v. Des Moines, supra.

No tax can be sustained in the absence of express permission :

“ * * * It follows then necessarily from these conclusions that the respective states would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets, or franchises, were it not for the permissive legislation of Congress.”

“ * * * This section then, of the Revised Statutes is the measure of the power of a state to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any state tax therefore which is in excess of and not in conformity to these requirements is void.”

Owensboro National Bank v. Owensboro, 173 U. S. 664.

Congressional consent to taxation has not been granted in the Home Owners' Loan Act and it cannot be implied.

Immunity of salaries from State taxation, recognized for a century, has engaged the attention of Congress for many years. Had there been a purpose in adopting the Home Owners' Loan Act to do a thing so unusual as to authorize taxation of the employees of the instrumentality, is it not reasonable to believe that Congress would have given expression to that purpose? It said nothing about taxation of salaries, just as it would have done had no such purpose been in mind. To tax the salaries would be without any precedent in the legislation relating to federal corporations, and it is improbable that Congress either did or would entertain such a purpose with respect to this *one* instrumentality without a specific declaration of a broad public policy on this subject.

POINT V.

The immunity of Federal instrumentalities rests on a different basis from that of State instrumentalities.—It is more extensive.

The petitioners contend that the case of *Helvering v. Gerhardt, supra*, is adverse to the immunity of employees of federal instrumentalities from state taxation.

Whatever may be the effect of this decision upon the state immunity, it does not pass upon the immunity of employees of federal instrumentalities from state taxation.

In concluding the opinion the Court said:

“The immunity, if allowed, would impose to an inadmissible extent a restriction upon the taxing power which the Constitution has granted to the Federal Government.”

Instead, it distinguishes the two immunities, both under basic constitutional theory and also as a practical matter, and affirms the rule as to federal immunity announced in prior cases.

In footnote 2, to the *Helvering v. Gerhardt* opinion in this connection the Court quotes:

/ “The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.” Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 435, 436, 4 L. ed. 579, 608, 609.”

The court in the *Gerhardt* case distinguished between the entire absence of power of the state to tax a federal

instrumentality on the one hand, and an implied prohibition against an actual interference, through a federal tax, with governmental functions of the state.

The following quotation is taken from footnote 1 of the *Helvering v. Gerhardt* opinion:

"It follows that in considering the immunity of federal instrumentalities from state taxation two factors may be of importance which are lacking in the case of a claimed immunity of state instrumentalities from federal taxation."

The court affirms that the two situations are dissimilar. And, again, referring to *McCulloch v. Maryland*, the Court in this *Gerhardt* case said:

"In sustaining the immunity from state taxation, the opinion of the Court, by Chief Justice Marshall, recognized a clear distinction between the extent of the power of a state to tax national banks and that of the national government to tax state instrumentalities."

The *Gerhardt* decision does not overrule, question or distinguish the decision in *People ex rel Rogers v. Graves, supra*, which is the last announcement of the Court on the direct question of immunity of employees of federal instrumentalities from state taxation. In view of this and of the clear distinction made as to the underlying theories of the two immunities, we urge the *Rogers* case as being applicable to the present inquiry.

The recent decision in the case of *James v. Dravo, supra*, emphasizes an exceptional class of cases, where, the court has determined as a question of fact that a tax affecting independent contractors doing business with the federal government would not burden or impede the functions of the federal government. The court points out, however, that

if such a tax were pressed to the point where, as a matter of fact, it did impede the performance of the functions of the national government, Congress might enlarge the immunity to include such independent contractors if Congress deemed it were necessary to do so in order to protect the performance of the functions of the national government.

In the *Gerhardt* case the Court defines the limits of state immunity:

"It is enough for present purposes that the state immunity from the national taxing power, when recognized in *Collector v. Day* (*Buffington v. Day*), 11 Wall. 113, 20 L. ed. 122, *supra*, was narrowly limited to a state judicial officer engaged in the performance of a function which pertained to state governments at the time the Constitution was adopted, without which no state 'could long preserve its existence.'"

The petitioners argue that the narrowed test prescribed for determining the immunity of state instrumentalities from federal taxation should also be applied to the immunity of federal instrumentalities from state taxation.

But in the same opinion the Court emphasizes the difference between the state and the federal immunity and said of the federal government:

"It was held that Congress, having power to establish a bank by laws which, when enacted under the Constitution, are supreme, also had power to protect the bank by striking down state action impeding its operations; and it was thought that the state tax in question was so inconsistent with Congress's constitutional action in establishing the bank as to compel the conclusion that Congress intended to forbid application of the tax to the Federal bank notes. *Cf. Osborn v. Bank of United States*, 9 Wheat. 738, 865-868, 6 L. ed. 204, 234, 235."

The immunities are claimed to be reciprocal in the sense that as judicial decision expands or contracts the one immunity a corresponding expansion or contraction should be accorded to the other.

We argue that the two situations are completely different, not only under constitutional theory but as a practical matter.

And the Court in the *Gerhardt* case sustains that view in discussing *Collector v. Day*, *supra*:

"The question there presented to the Court was not one of interference with a granted power in a field in which the Federal Government is supreme, but a limitation by implication upon the granted Federal power to tax."

The supreme federal taxing power is limited only by the guarantee to the states of their traditional government and governmental functions and the state immunity is found in that limitation and only there.

At this point we again quote from the *Gerhardt* opinion:

"In tacit recognition of the limitation which the very nature of our Federal system imposes on state immunity from taxation in order to avoid an ever expanding encroachment upon the Federal taxing power, this Court has refused to enlarge the immunity substantially beyond those limits marked out in *Collector v. Day* (*Buffington v. Day*), 11 Wall. 113, 20 L. ed. 122, *supra*."

On the other hand the state taxing power, which is not supreme, must yield to all the federal powers—they are supreme.

Although in many opinions references are found to "reciprocal immunity" it is apparent that the word "reciprocal" has been used as describing the immunity that was "given and received" or the immunity that was due from "each to

each." The context of the several opinions and the facts outlined in the several decisions show that the immunity was not regarded as a "mutual immunity."

The federal taxing power is supreme and the state immunity from federal taxation is narrower than the federal immunity from state taxation.

McCulloch v. Maryland, supra, had indeed recognized the plain distinction between the two situations and had based its holding of federal immunity on the principle of delegated federal supremacy. The states, having given to the federal government absolute supremacy in certain fields, have no power by a tax statute, said the Court, to detract from or endanger the supremacy which they have bestowed by the Constitution.

The federal immunity rests entirely upon the great principle that "the Constitution and laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States and cannot be controlled by them." To urge that the immunity is reciprocal is to deviate from the simple proposition that there can be no state tax of federal instrumentalities because the Constitution declares a federal law under which the instrumentality is created to be supreme over the laws of the state.

In the course of the *McCulloch v. Maryland, supra*, opinion, Mr. Justice MARSHALL said:

"It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence (p. 427).

* * * * *

The American people have declared their constitution and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states (p. 432).

* * * The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government is conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, an empty and unmeaning declaration (p. 433).

* * * The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

We find that the supreme authority of the federal government to tax is only limited by the provision which guarantees to each State Government its sovereign structure.

The Court in *Helvering v. Gerhardt*, *supra*, discussing the decision in *Collector v. Day*, said:

"The immunity which it implied was sustained only because it was one deemed necessary to protect the states from destruction by the federal taxation of those governmental functions which they were exercising when the Constitution was adopted and which was essential to their continued existence."

A state is without power to tax persons, instrumentalities, or agencies engaged in exercising a power granted by the Constitution to the federal government, but the federal government can exercise its delegated powers of taxation equally against all men so long as it does not actually interfere with traditional governmental functions of the State.

There is in one case a complete absence of power; in the other a limitation upon the exercise of an admitted power.

If this Court in *Helvering v. Gerhardt*, *supra*, noted that the immunity first announced in *Collector v. Day*, *supra*, had been so extended as to be erroneously regarded as

reciprocal and coextensive with the federal immunity, this decision does not justify a state tax upon federal instrumentalities or upon the salaries of persons engaged in the discharge of the sovereign functions of the United States.

In *Helvering v. Therrell*, 303 U. S. 218, the Court said:

"The constitution contemplates a national government free to use its delegated powers; also state governments capable of exercising their essential reserved powers; both operate within the same territorial limits; consequently the constitution itself, either by word or necessary inference, makes adequate provision for preventing conflict between them.

"Among the inferences which derive necessarily from the constitution are these: No state may tax an appropriate means which the United States may employ for exercising their delegated powers; the United States may not tax instrumentalities which a state may employ in discharge of her essential governmental duties—that is, those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the constitution.

"By definition precisely to delimit, 'delegated powers' or, 'essential governmental duties' is not possible. Controversies involving these terms must be decided as they arise, upon consideration of all the relevant circumstances."

The distinction between the federal delegated powers and those governmental functions exercised by the states is shown in the case of *United States v. California*, 297 U. S. 180.

The suggestion in *Helvering v. Therrell*, *supra*, that a controversy may arise with respect to the definition of "delegated powers" cannot mean that any subordinate activities of a legitimate federal instrumentality might call into question its validity.

A federal function must be exercised in a governmental capacity—a delegated power exercised through an appropriate means—otherwise it becomes a mere usurpation in defiance of the law (Point I).

If the instrumentality created and used by Congress to carry into effect its constitutional powers is adapted to aid it in exercising those powers, the Courts will not question or review the decision of Congress in creating and using the instrumentality (Point I).

Subordinate activities will not destroy the authority of Congress to create this Corporation (Point I).

If the employees of a federal instrumentality are taxable because the functions of the instrumentality are construed to be proprietary, then the instrumentality is unconstitutional since a federal instrumentality can only perform governmental functions.

It will also be observed that the immunity of the employees of a Federal instrumentality rests on a different basis than the immunity which might be claimed by an independent contractor engaged on the work of such an instrumentality.

James v. Dravo, supra;

People ex rel. Rogers v. Graves, supra;

Metcalf v. Mitchell, 269 U. S. 514.

In the case of *James v. Dravo, supra*, at page 152, the court sets apart the independent contractor cases from cases arising out of taxation of Government securities, salaries and contracts.

It has been argued that the decision of *James v. Dravo, supra*, is authority for the proposition that the court will inquire, as each controversy arises, into the burden or effect of each tax upon the Governmental operation. The decision in *James v. Dravo* is confined to an independent contractor. The Court narrowed the decision to the case of an independent contractor and the opinion definitely refused to apply the doctrine of cases relating to securities, property or officers.

Neither did the court adopt or apply the doctrine of cases relating to an instrumentality of government. The court cited with approval the case of *People ex rel. Rogers v. Graves, supra*, and held that the tax under consideration in the case of *James v. Dravo, supra*, did not interfere in any substantial way with the performance of Federal functions.

The court expressly followed the decision in *Metcalf v. Mitchell, supra*, and guided on the principle that government bonds, salaries, property and instrumentalities are not upon the same footing in regard to taxation as independent contractors.

The last two paragraphs of the opinion in *People ex rel. Rogers v. Graves*, page 409 rejecting the suggestion that relator was an independent contractor, evidence the wide difference in the approach to cases growing out of taxation upon independent contractors and the cases growing out of taxation on salaries, securities and contracts. In the opinion, *James v. Dravo, supra*, page 156, the court refers to the case of *Metcalf v. Mitchell, supra*, as a pivotal decision because an independent contractor was involved, and states:

"The pith of the decision in the case of *Metcalf* is that Government bonds and contracts for the services of an independent contractor are not upon the same footing. The decision was a definite refusal to extend the doctrine of cases relating to Government securities, and to the instrumentalities of Government, to earnings under contracts for labor. The reasoning upon which that decision was based is controlling here."

If, in this case, the employee of the Home Owners' Loan Corporation is taxable then the bonds of the Corporation would be taxable and a grave question would arise as to the validity of the guarantee by the government of the bonds of the corporation.

POINT VI.

The State of New York has exempted relator's salary from taxation by the Tax Law of the State of New York.

Section 359, Paragraph 2-f of the Tax Law of the State of New York excludes from gross income:

"Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States."

There is no reason to assume that the Legislature of the State of New York intended to differentiate between the employees in the departments of the Government and those in the wholly owned instrumentalities of the Government.

Relator is an employee of the United States within the rule discussed and approved in the case of *Metcalf & Eddy v. Mitchell*, *supra*. The nature of this government instrumentality and the functions which it performs demonstrate that its employees are truly instrumentalities of the United States.

James v. Dravo, supra;

People ex rel. Rogers v. Graves, supra.

By Act of Congress, 49 Stat. 1597 (deficiency appropriation bill), 74th Congress, Ch. 689, Title IV, Section 7 thereof, it is provided that, notwithstanding any other provision of law, Home Owners' Loan Corporation shall not incur any obligation for administrative expenses, except pursuant to an annual appropriation specifically therefor.

By a succeeding appropriation act, Public 534, 75th Congress, Third Session, and the 4th Section thereof, it was provided that the administrative expenses of Home Owners' Loan Corporation shall be accounted for and audited in accordance with the terms and provisions of the Budget and

Accounting Act of 1921, Ch. 18, 67th Congress, First Session, 42 Stat. 20, and the Home Owners' Loan Corporation comes within the definition of department or establishment contained in the Budget and Accounting Act.

In the light of the statutes dealing specifically with the Home Owners' Loan Corporation and of the administrative practices prevailing, the Corporation is not enabled to employ commercial methods and to conduct its operations as a private corporation.

U. S. ex rel. Skinner and Eddy v. McCarl, 275
U. S. 1.

While we insist that respondent's salary is constitutionally immune, nevertheless, inasmuch as the Home Owners' Loan Corporation is but the means by which the United States acts, the salary is received from the United States and is expressly exempt by the New York statute.

CONCLUSION.

The functions of the Home Owners' Loan Corporation are essential to the preservation of the general welfare and the promotion of economic security in the nation.

The Corporation is immune from taxation and the fixed salaries paid by it to its employees are immune from state taxation.

The determination of the Court of Appeals and the judgment entered thereon should be affirmed.

Respectfully submitted,

DANIEL MCNAMARA, JR.,
Solicitor for Relator,
Brooklyn, New York.

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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 478.

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSY,
as Commissioners constituting the State Tax Commission
of the State of New York, *Petitioners*,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation
of JAMES B. O'KEEFE, *Respondent*.

BRIEF OF THE STATE OF MISSOURI

as Amicus Curiae.

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as Commissioners constituting the State Tax Commission of the State of New York, *Petitioners*,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation
of JAMES B. O'KEEFE, *Respondent*.

ON CERTIORARI TO THE SUPREME COURT OF
THE STATE OF NEW YORK

BRIEF OF THE STATE OF MISSOURI

as Amicus Curiae

STATEMENT

There are thousands of persons in the State of Missouri who are employees of corporations or agencies created by the Government of the United States, including a substantial number of employees of the Home Owners' Loan Corporation. If this cause should be decided adversely to the State Tax Commission of New York, it will deprive the State of Missouri of very substantial revenues under its income tax law.

For several years the Attorney General of Missouri has concerned himself with the problem of the liability of employees of certain types of federal instrumentalities for Missouri in-

come taxes, and last year obtained an adjudication by the Supreme Court of Missouri that the income of a joint employee of the several units of the United States Farm Credit Administration is subject to Missouri income taxes. *State ex rel. Baumann v. Bowles*, 115 S. W. (2nd) 805 (1938) so that the income of employees of the units of the Farm Credit Administration and similar federal instrumentalities are now being subjected to Missouri income taxes. If this decision of the Supreme Court of Missouri does not correctly interpret the Constitution of the United States, the Missouri officials have no desire to subject these employees of federal instrumentalities to state income taxation, but if, as the Attorney General of Missouri believes, the decision of the Supreme Court of Missouri is a correct exposition of the Constitution of the United States, and if this Court declares it so to be, the State does desire to continue to collect these income taxes. Because of its vital interest in the subject-matter of the case now before the Court and because of its firm conviction that the income of these employees is subject to state taxation, the State of Missouri, as a friend of the Court, respectfully submits its views for the consideration of the Court.

SUMMARY OF ARGUMENT.

This Court has consistently said that the immunity of state instrumentalities from federal taxation is co-extensive with the immunity of federal instrumentalities from state taxation, and since the state immunity has been limited to certain governmental instrumentalities, the federal immunity should be equally so limited in order that the reciprocal nature of the immunity may be maintained.

Neither the purpose, the function, nor the facts of creation, ownership and control by the United States of the Home Owners' Loan Corporation, should exempt the income of its employees from non-discriminatory state income taxes. The Home Owners' Loan Corporation carries out no essential, usual, traditional, or strictly governmental function of the national government, and therefore the principle of *South*

Carolina v. United States should be applied, and even if its function could be so designated, under *Helvering v. Gerhardt*, a state income tax on an employee of the Corporation would impose such a remote and indirect burden on the national government as to compel rejection of the claim of immunity.

ARGUMENT.

INTRODUCTION.

The issue before the Court is entirely a question of constitutional law, to be answered by an interpretation of the Constitution of the United States as construed by this Court. The subject-matter arises out of our dual form of government, state and federal, and concerns the doctrine of the exemption of instrumentalities of one of the two governments from undue burdens by the other, whether in the form of taxation or otherwise. The real and in fact the only questions in the case are: First, whether the Home Owners' Loan Corporation is "such an instrumentality of the federal government as to be immune from state taxation,"¹ and second, "even though the function be thought important enough to demand immunity from a tax upon the state itself,"² if the fact that this tax is laid upon individuals makes the burden passed on to the government so speculative and uncertain as to forbid recognition of the immunity.

"The Constitution contains no express limitation on the power of either a state or the national government to tax the other, or its instrumentalities. The doctrine that there is an implied limitation stems from *M'Culloch v. Maryland*, 4 Wheat. 316 (1819)."³ The principle was first applied to the income of a federal employee in the case of *Dobbins v. The Commissioners of Erie County*, 16 Pet. 435 (1842), and was applied there to exempt from state taxation the income of a captain of a United States revenue cutter.

-
1. *New York ex rel. Rogers v. Graves*, 299 U. S. 401, 404 (1937).
 2. *Helvering v. Gerhardt*, 304 U. S. 405, 420 (1938).
 3. *Id.* p. 411.

It was not until fifty years after Marshall had announced the doctrine, that it was declared equally applicable to federal taxation or burdens on state instrumentalities. In the case of *The Collector v. Day*, 11 Wall. 113 (1870), it was held that a federal income tax could not be imposed on a state probate judge, "for like reasons" that a state income tax could not apply to a federal officer.

For the next thirty-five years the doctrine was applied with equal force to state and federal taxation on the instrumentalities of the other government, and the cases for that period can be examined in vain for any indication that the governments are not on a parity as to their rights to tax each other, or that the doctrine of immunity, at least as to excise taxes, has any limitations or qualifications. Then, in 1905, this Court handed down its decision in the case of *South Carolina v. United States*, 199 U. S. 437, announcing that the principle of immunity is subject to a limitation and protects only the essential or strictly governmental functions of a state, a distinction marking a division between these functions and instrumentalities and those of a commercial or proprietary nature.

The Court has never announced any modification of the doctrine of *South Carolina v. United States*, *supra*, and many times has approved it. Also many times since that decision has the Court said that the immunity of a state or its instrumentalities from taxation by the federal government is equal and reciprocal to the exemption of the federal government and its instrumentalities from taxation by the states, but no case has ever expressly stated that the doctrine of *South Carolina v. United States*, *supra*, applies to the United States and its instrumentalities.

Thus the scope of this brief will cover two inquiries: First, is the income of every person working for every instrumentality authorized by Act of Congress immune from state income taxes, or, stated differently, does the doctrine of *South Carolina v. United States*, *supra*, apply to federal instrumentalities; and second, is the income of an employee of the Home Owners' Loan Corporation exempt from New York income taxes?

I.

NOT ALL PERSONS WORKING FOR EVERY INSTRUMENTALITY CREATED BY ACT OF CONGRESS ARE IMMUNE FROM STATE INCOME TAXES.

If the principle of the immunity of instrumentalities of the United States from state taxation is equal and reciprocal to the immunity of state instrumentalities from federal taxation, then the cases defining and marking the limits of the immunity of instrumentalities of either government will also define the limits of the immunity of the instrumentalities of the other government. Therefore the first inquiry will be if the immunity has been declared to be equal and co-extensive.

A. This Court has said that the immunity is equal and reciprocal.

The first case squarely upholding the immunity of a state instrumentality from federal taxation was *The Collector v. Day*, 11 Wall. 113 (1870). The Court in that case said:

"There is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation." 11 Wall. 127.

The Court considered that its decision was compelled by the earlier decision in *Dobbins v. The Commissioners of Erie County*, 16 Pet. 435 (1842), and after referring to that case as holding that the Constitution prohibited a state from taxing the income of an officer of the United States, said:

"And we shall now proceed to show that, upon the same construction of that instrument, and for like reasons,* * that government is prohibited from taxing the salary of the judicial officer of a State." 11 Wall. 124.

*Unless otherwise indicated, the emphasis in all quotations in this brief is attributable to counsel.

In *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429 (1895), the Court said:

"As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State." 157 U. S. 584.

In *Ambrosini v. United States*, 187 U. S. 1 (1902), the Court said:

"The general principle is that as the means and instrumentalities employed by the General Government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the General Government." 187 U. S. 7.

In *Metcalf & Eddy v. Mitchell*, 269 U. S. 514 (1926), Mr. Justice Stone made it very plain that the exemption is absolutely reciprocal:

"The very nature of our constitutional system of dual sovereign governments is such as impliedly to prohibit the federal government from taxing the instrumentalities of a state government, **and in a similar manner** to limit the powers of the states to tax the instrumentalities of the federal government. * * *

"Just what instrumentalities of **either a state or the federal government** are exempt from taxation by the other cannot be stated in terms of universal application, but this Court has repeatedly held that those agencies through which **either** government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other. * * *

"When, however, the question is approached from the other end of the scale, it is apparent that not every

person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. * * *

"As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance, but recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the state; and it rests on the conviction that **each** government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other." 269 U. S. 521-523.

In *Willcuts v. Bunn*, 282 U. S. 216 (1931), the Court said:

"The familiar aphorism is 'that as the means and instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the general government.' "

282 U. S. 225.

In *Indian Motorcycle Co. v. United States*, 283 U. S. 570 (1931), the Court said:

"It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the states, and that the instrumentalities, means and

operations whereby the states exert the government powers belonging to them are **equally exempt** from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provision of the Constitution which look to the maintenance of the dual system. * * * 283 U. S. 575.

and further:

"* * * the governmental agencies and operations of the states have the same immunity from Federal taxation that like agencies and operations of the United States have from taxation by the states." 283 U. S. 577.

This case involved a state exemption from federal taxation, and evidently the reason for the decision was the case *Panhendle Oil Co. v. Mississippi*, 277 U. S. 218 (1928), which only differed from the *Indian Motorcycle* case in that it involved a federal immunity from state taxation.

The case of *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393 (1932), also was based squarely on the earlier decision in *Gillespie v. Oklahoma*, 257 U. S. 501 (1922), differing from the case only in the government claiming exemption, and the overruling of these cases in *Helvering v. Mountain Producers Corp.*, 303 U. S. 376 (1938), does not impair their interdependency. Probably the decision in the *Coronado* case shows more than any quotation of language declaring the equality of the immunity, that the Court has considered that each government stands on exactly the same footing as to immunity of its instrumentalities from taxation by the other government, and that a decision holding an instrumentality of one government exempt from taxation by the other was, at least until eight months ago, of itself complete and adequate authority for the decision of a reciprocal case involving the same kind of an instrumentality. Mr. Justice McReynolds in *Burnet v. Coronado Oil & Gas Co.*, *supra*, goes so far as to say that the case is "indistinguishable" from *Gillespie v. Okla*

homa, supra (285 U. S. 398), and quotes what has been quoted above from *Indian Motorcycle Co. v. United States* as to the equality and reciprocity of the principle of exemption.

In *Fox Film Corp. v. Doyal*, 286 U. S. 123, 128 (1932), Chief Justice Hughes referred to "the principle of the immunity from state taxation of instrumentalities of the Federal Government, and of **the corresponding immunity** of state instrumentalities from Federal taxation—essential to the maintenance of our dual system * * *", and in *United States v. California*, 297 U. S. 175 (1936), Mr. Justice Stone said:

"That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, **and is equally a restriction on taxation by either of the instrumentalities of the other.** Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, * * * which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it." 297 U. S. 184.

These cases show that the principle of immunity of the instrumentalities of the federal government from state taxation does not differ in quality or extent from the corresponding immunity of state instrumentalities from federal taxation.

The development of the theory of immunity during the last two years has been an active one. In *New York ex rel. Rogers v. Graves, supra*, the doctrine was not re-examined, the Court noting its recent exposition in the *Indian Motorcycle Co. case, supra*, with approval. In *Brush v. Commissioner*, 300 U. S. 352 (1937), there is no suggestion that the immunity is not co-extensive. In *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937) doubt is cast equally on the validity of cases upholding claims of exemption from state and federal taxes, and in discussing *Metcalf & Eddy v. Mitchell*, 269 U. S. 514 (1926), designated as a "pivotal decision," the Chief Justice said:

"The reasoning upon which that decision was based is controlling here. * * * * *

"While the Metcalf Case was one of a federal tax, the reasoning and the practical criterion it adopts are clearly applicable to the case of a state tax upon earnings under a contract with the Federal Government." 302 U. S. 156-7,

and Mr. Justice Roberts, in his dissenting opinion, based a conclusion on the premise that "if, as the court has always held, the immunity is reciprocal * * *" (p. 182).

Helvering v. Therrell, 303 U. S. 218 (1938), *Helvering v. Bankline Oil Co.*, 303 U. S. 362 (1938), and *Helvering v. Mountain Producers Corp.*, 303 U. S. 376 (1938), all involving federal taxes, bring the review up to May of 1938 with the reciprocal nature of the immunity presumably intact, when in *Helvering v. Gerhardt*, 304 U. S. 405, the Court, in a case not involving federal immunity from state taxation, offered, by way of a dictum in a footnote, the proposition that the immunity was not necessarily reciprocal, although expressly refraining from inquiry whether federal immunity rests on a different basis from state immunity, and whether, or to what degree, it is more extensive. 304 U. S. 411. Thus the only declaration of non-reciprocity to date is couched in exceedingly equivocal terms.

B. The limitation on the principle of immunity is equally applicable to the United States as to the States.

Under Point IA, *supra*, cases were cited to show that this Court has considered the principle of immunity as applied to state and federal instrumentalities as being reciprocal and co-extensive. It has already been noted that since 1905 there has been a well-defined limitation or restriction on this principle of immunity, established by *South Carolina v. United States*, *supra*. This limitation has been well stated in *Indian Motorcycle Co. v. United States*:

"Of course, the reasons underlying the principle mark the limits of its range. Thus * * * it * * * has been held where a state departs from her usual governmental func-

tions and 'engages in a business which is of a private nature' no immunity arises in respect of her own or her agents' operations in that business." 283 U. S 576.

It is true that the language just quoted sets out the immunity in terms of state immunity from federal taxation, but in that case the Court was dealing only with state immunity, and there is nothing in the language of the opinion, or in any opinion of this Court dealing with a state tax which counsel have discovered, which says that the same limitation does not apply to the immunity of federal instrumentalities, and such an inference cannot be drawn without running counter to the cases cited under Point IA above. If, then, the immunity is equal and reciprocal and applies with like force and to the same extent to state and federal governments, is not an argument that the federal immunity is unlimited but the state immunity limited to certain kinds of activities, contrary to all these cases just mentioned and in conflict with the often-expressed doctrine that the immunity is corresponding and equal? Although, as stated, no case squarely states that the principle of *South Carolina v. United States*, *supra*, applies to the United States, nonetheless that it does so apply is implicit in many decisions of this Court.

1. It is sometimes argued that the principle of *South Carolina v. United States* can from its nature only apply to state immunity from federal taxation and not to federal immunity from state taxation, because the United States is a government of enumerated powers, and, therefore, anything the United States Government does, must, of necessity, be governmental and therefore immune from state taxation; that the states have unlimited sovereignty except as it is curtailed by the United States Constitution, and therefore can engage in either private or governmental activities, whereas the United States, as a government of enumerated powers, has no unrestricted sovereignty and is confined to the exercise of governmental powers delegated to it by the Constitution. But this is only another way of saying that the principle of immunity from taxation is one thing and has certain limits as applied

to the states, and is another thing, unrestricted and without limits, as applied to the United States, and it can only be correct if the statements in all of the cases under Point IA above were ill-considered and incorrect. For example, when *New York ex rel. Rogers v. Graves*, 299 U. S. 401 (1937), came before this Court, the Court had before it a case thirty years old, holding that the acquisition and establishment of the Panama Canal by the federal government was a valid exercise of constitutional powers, *Wilson v. Shaw*, 204 U. S. 24 (1907), and the opinion in the *Rogers* case shows that the Panama Railroad Company was acquired as a part of the original canal project. If the contention that the doctrine of *South Carolina v. United States* does not apply to the United States is correct, and that any constitutional federal enterprise must, of necessity, be governmental and therefore tax exempt, this Court could, in the *Rogers* case, have merely referred to *Wilson v. Shaw, supra*, and held that the enterprise having been held constitutional, it necessarily followed that it was a governmental instrumentality and exempt from state taxation. There seems to be no other possible explanation for the Court's unanimous opinion in the *Rogers* case but that the Court recognized that not all constitutional federal enterprises are necessarily tax exempt, and that the limitation on the principle of immunity established in *South Carolina v. United States* applies to the federal government as well as to the states.

The Court evidently found it necessary in the *Rogers* case to satisfy itself that the Panama Railroad Company was a necessary adjunct of a vital federal instrumentality created under the national defense and commerce powers in the Federal Constitution, before it was willing to hold the income of one of the Railroad Company's employees exempt from state taxation. An illustration of the same situation is found in *Federal Land Bank of St. Louis v. Priddy*, 295 U. S. 229 (1935), in which the Court analyzed at some length the relationship of the Federal Land Banks and Joint Stock Land Banks to the United States, when it had been held fifteen years before, in *Smith v. Kansas City Title & Trust Co.*,

255 U. S. 180 (1921), that the act creating the banks was constitutional. Here also the Court seemingly recognized that not every constitutional federal enterprise is withdrawn from state taxation, and that only those of an essential or strictly governmental character are so withdrawn.

Attention is also directed to a statement in *Baltimore National Bank v. State Tax Commission*, 297 U. S. 209 (1936). The Court in that case was considering the Reconstruction Finance Corporation. Its decision turned entirely on the meaning of a federal statute which made it unnecessary for it to consider whether that corporation was such an essential federal instrumentality as to be exempt from state taxation, but the point was touched by the Court when it said:

"We assume, though without deciding even by **indirection**, that within *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, a corporation so conceived and operated is an instrumentality of government without distinction in that regard between one activity and another." 297 U. S. 211.

Surely the Court, in choosing this language, carefully avoided any decision as to the essential governmental or non-governmental character of the Reconstruction Finance Corporation, and intentionally left open the question of the applicability of the doctrine of *South Carolina v. United States* to federal instrumentalities.

2. It is sometimes suggested, probably on the basis of some of Chief Justice Marshall's strongest Federalist opinions, that the United States is not precisely a dual sovereignty form of government, but that because the Constitution is the supreme law of the land, that where a conflict arises between state and federal sovereignty, it must always be resolved in favor of the federal government. Because that conception is so widespread, we pause for a moment to meet it.

Such an argument was advanced in the case of *The Collector v. Day*, *supra*, and answered by the Court as follows:

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"The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality". 11 Wall. 126.

— As recently as *Brush v. Commissioner*, 300 U. S. 352 (1937), the principle of equality was enunciated:

"So long as our present form of government endures, the states, it must never be forgotten, 'are as independent of the general government as that government within its sphere is independent of the states'." 300 U. S. 364.

No power of a government is more important to its independence and very existence than the taxing power:

"The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive." *Nicol v. Ames*, 173 U. S. 509, 515 (1899).

How can a state be independent if its taxing power is unduly curtailed? Of course it is curtailed by the principle of *M'Culloch v. Maryland*, but it should not be curtailed any more than that principle, as limited and modified in *South Carolino v. United States*, requires.

As the Chief Justice cautioned in *Willcuts v. Bunn*, 282 U. S. 216, 231 (1931) in referring to the principle of *M'Culloch v. Maryland*:

"It must be remembered that we are dealing not with any express constitutional restriction, but only with an asserted implication."

Thus, if the principle of inter-governmental immunity from taxation is reciprocal, and this can only be true if the limi-

tation of *South Carolina v. United States* applies to the immunity of both governments, how can the conclusion be escaped, either logically or on the basis of the reasons behind the rule, that if the United States can tax state instrumentalities which are not essentially governmental, the states can also tax instrumentalities authorized by the United States which are likewise not essentially governmental?

3. Finally, this Court has held that the states can impose property or excise taxes on certain agencies and instrumentalities of the federal government. These cases can be divided into three classes:

(a) Corporations created by the United States to carry out essential governmental functions; (b) Corporations utilized by the United States to carry out essential governmental functions; and (c) Agencies licensed, chartered and supervised by the United States for the public benefit.

(a) **Corporations created by the United States to carry out essential governmental functions.**

In *Railroad Co. v. Peniston*, 18 Wall. 5 (1873) the Congress had created the Union Pacific Railroad Company for the purpose of transporting government messages and mail, and especially for the important wartime purpose of transporting troops and munitions. By its charter the United States was to have the prior right to the services of the company and was to receive a certain percentage of its earnings under certain conditions. Part of its land and capital were furnished by the federal government so that these purposes could be accomplished, and the United States given a lien on the railroad property for security. The Court said:

"Admitting, then, fully, as we do, that the company is an agent of the General government, designed to be employed, and actually employed, in the legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from State taxation?" 18 Wall. 32.

The Court held that it was not so exempt and laid down the following principle which has never been repudiated:

"It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power." 18 Wall. 36.

In *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U. S. 549 (1922), the defendant had been created by an Act of Congress and given very broad powers for mobilization and control of the United States Merchant Marine during the war. The Court held that this creation and the delegation of these powers did not so identify it with the United States as to require suit against the corporation to be brought in the Court of Claims. And compare *United States v. Strang*, 254 U. S. 491 (1921), involving the same government corporation.

(b) Corporations utilized by the United States to carry out essential governmental functions.

In *Thomson v. Pacific Railroad*, 9 Wall. 579 (1869), the Court had before it a state-chartered corporation having the same powers and under the same obligations as a federal agent, as the Union Pacific Railroad Company before the Court in *Railroad Co. v. Peniston*, *supra*, and the Court held that the fact that this state corporation was employed as a federal agency and instrumentality, could not exempt it from state taxation.

In *Baltimore Shipbuilding & Dry Dock Co. v. Baltimore*, 195 U. S. 375 (1904), the plaintiff's principal function was to service ships of the United States government free of charge, and for this purpose and under this arrangement the federal government deeded some of its property to the company under an arrangement whereby, in the event of default, the property should revert to the United States. The Court held

that under these circumstances a claim for immunity from state taxation could not be maintained. Compare *Trinityfarm Construction Co. v. Grosjean*, 291 U. S. 466 (1934), where it was held that the plaintiff, which was employed in the building for the United States government of flood control levees, could not escape state taxation because the effect of a state sales tax on the United States government would be too remote to warrant immunity.

In *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937), it was held that the company was liable for a tax on the privilege of engaging in the business of contracting, based on gross receipts from the United States, for which it was constructing locks and dams in the navigable rivers of the United States.

(c) **Agencies licensed, chartered and supervised by the United States for the public benefit.**

In *Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17 (1934), the plaintiff sought immunity from state taxation on the ground of its deriving its right to do business under a license granted by the United States, by which it was strictly regulated. The Court held that the principle of immunity could not be invoked. So also was the claim of immunity denied in the cases of *Broad River Power Co. v. Query*, 288 U. S. 178 (1933), involving a licensee of the Federal Power Commission, rigidly supervised by that body, and in *Susquehanna Power Co. v. State Tax Commission*, 283 U. S. 291 (1931), involving a licensee of the Federal Power Commission building a dam on the navigable waters of the United States.

These three classes of cases carry out the principle announced so clearly by the Chief Justice in *James v. Dravo Contracting Co.*, *supra*, that not every person employed by the United States to carry out a constitutional aim of that government can, by virtue of his connection with the government, claim an immunity from state taxation. These cases will be discussed in more detail under Point II. They show that creation by, charter or regulation by, or utilization as an agent by, the federal government, does not of itself confer comprehensive tax immunity, even though the power under

which the corporation is created and utilized be such a vital federal power as the war power dealt with in the *Peniston* case.

In concluding under Point I, counsel submit that there is a principle of immunity of certain instrumentalities of one government from taxation by the other; that the principle is corresponding and has the same scope and extent in its application on the one hand to state instrumentalities, and on the other hand to federal instrumentalities; that since the principle of immunity, as applied to state instrumentalities, only exempts from taxation essential governmental instrumentalities, a tax on which would be a direct and substantial burden on the state in exercising its essential governmental functions, so also the exemption from state taxation only applies to essential governmental instrumentalities of the United States, a state tax on which would unduly burden the essential governmental functions of the United States. There thus remains to be considered only the question of whether or not the Home Owners' Loan Corporation is such an essential governmental instrumentality of the United States that a state income tax on relator's salary derived from that corporation would unduly burden the Government of the United States in carrying out some strictly governmental function.

II.

THE INCOME OF AN EMPLOYEE OF THE HOME OWNERS' LOAN CORPORATION IS NOT EXEMPT FROM STATE INCOME TAXES.

A. The rule of immunity with its limitation defined.

It is easy enough to make a statement of the general rule of inter-governmental immunity from taxation. But it is not so easy to state the limitation on the rule in any such terms as will render easy the solution of each case. As stated by Mr. Justice Stone in *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 522, 523 (1926):

"Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application.

* * *

"Experience has shown that there is no formula by which that line may be plotted with precision in advance, but recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation."

And as said in *Burnet v. Jergins Trust*, 288 U. S. 508, (1933):

"The application of the doctrine of implied immunity must be practical (*Union P. R. Co. v. Peniston*, 18 Wall. 5, 31, 36, 21 L. ed. 787, 791, 793) and should have regard to the circumstances disclosed."

Several tests have been used by this Court to distinguish governmental instrumentalities which are exempt from taxation from those which are not. These tests are discussed in *Helvering v. Commissioner*, 300 U. S. 352, 361 (1937), as follows:

"The phrase 'governmental functions,' as it here is used, has been qualified by this court in a variety of ways. Thus, in *South Carolina v. United States*, 199 U. S. 437, 461, 50 L. ed. 261, 268, 26 S. Ct. 110, 4 Ann. Cas. 737, it was suggested that the exemption of state agencies and instrumentalities from federal taxation was limited to those which were of a *strictly* governmental character, and did not extend to those used by the state in carrying on an ordinary private business. In *Flint v. Stone Tracy Co.*, 220 U. S. 107, 172, 55 L. ed. 389, 421, 31 S. Ct. 342, Ann. Cas. 1912B, 1312, the immunity from taxation was related to the *essential* governmental functions of the state. In *Helvering v. Powers*, 293 U. S. 214, 225, 79 L. ed. 291, 295, 55 S. Ct. 171, we said that the state 'cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from *usual* governmental functions and to which, by reason of their nature, the federal taxing power would normally extend.' And immunity is not established because the state has the power to engage in the business

for what the state conceives to be the public benefit. Ibid. In *United States v. California*, 297 U. S. 175, 185, 80 L. ed. 567, 573, 56 S. Ct. 421, the suggested limit of the federal taxing power was in respect of activities in which the states have *traditionally engaged*." (Court's emphasis.)

The Court then goes on to say that for the purposes of that case the only inquiry will be whether the activity there in question constituted "an essential governmental function within the proper meaning of that term," but this is not further explained, and this statement sheds very little light on what is meant as the true test.

In *Helvering v. Therrell*, 303 U. S. 218 (1938), those state instrumentalities which are declared exempt from federal taxation are defined as those used in the discharge of the state's "essential" governmental duties, and in *Helvering v. Mountain Producers Corp.*, 303 U. S. 376 (1938), it is declared that where a private person seeks immunity from federal taxation because of his work for a state, the burden on the state must be "direct and substantial," not "indirect and remote," to support the immunity.

If the doctrine of immunity is reciprocal, including a coetaneous limitation on it based on the nature of the function performed, only these cases dealing with the limitation on the principle of immunity, all of them being cases on state immunity, are relevant, because, to date, there has been no case holding that the nature of the function performed is or is not decisive on immunity from state taxation. Certainly the doctrine of *South Carolina v. United States*, *supra*, has never been decided not to apply to federal instrumentalities.

B. Various attributes of the Home Owners' Loan Corporation as affecting tax immunity.

1. Public purpose and welfare.

Let it be assumed, for the purpose of argument, that the Home Owners' Loan Corporation is a constitutional activity of the federal government, and that the Congress created

it solely for the public welfare and benefit. Does this public purpose itself confer an immunity on its employees from state income taxation?

If the doctrine of immunity is reciprocal, the case of *Helvering v. Powers*, 293 U. S. 214 (1934), answers the question. In that case the Commonwealth of Massachusetts had taken over the street railway company in Boston, and the Act providing for public operation created a board of five trustees to be appointed by the governor, with the advice and consent of the Council, for ten-year terms, who were to be sworn before entering upon their duties. That the Commonwealth was operating the road was made clear by the duty of the Commonwealth to stand any operating deficits.

The Act under which the railroad had been taken over had been attacked as one not for a public purpose, and if it had not been for a public purpose it would have been declared unconstitutional, but this Court in *City of Boston v. Jackson*, 260 U. S. 309 (1922), sustained it as one enacted for a public purpose, and the Supreme Judicial Court of Massachusetts, at the time of the *Powers* case, had already "characterized the 'public operation' as 'undertaken by the Commonwealth not as a source of profit, but solely for the general welfare.' *Boston v. Treasurer*, 237 Mass. 403, 113 N. W. 390, *supra*." 293 U. S. 222. The Chief Justice said:

"The trustees are the administrative agents of the Commonwealth in this enterprise, and we may assume, as the Circuit Court of Appeals has held, that the trustees come within the general category of 'public officers' by virtue of their appointment by the Governor, with the advice and consent of the Council, and their tenure and duties fixed by law." 293 U. S. 222-3.

The Chief Justice further said, holding that the income of the trustees was not exempt from federal income taxes:

"The State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions

and to which, by reason of their nature, the federal taxing power would normally extend. The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity. * * * The necessary protection of the independence of the state government is not deemed to go so far." 293 U. S. 225.

In the original case establishing the limitation on the principle of immunity, *South Carolina v. United States*, a similar situation existed, because prior to the decision in that case the Supreme Court of the United States had upheld the South Carolina Liquor Monopoly Act against attacks based on the claim that the act was not one for a public purpose. *Vance v. W. A. Vandercook Co.*, 170 U. S. 438 (1898). And compare *Ambrosini v. United States*, 187 U. S. 1 (1902).

These cases will show, it is submitted, that merely because a government has power to engage in an activity, and does engage in an activity, and does engage in it for what admittedly the government conceives to be the public benefit and welfare, is not a decisive factor in determining tax immunity. Doubtless, if the South Carolina Liquor Monopoly Act and the Boston Elevated Railway Public Operation Act had not been regarded by this Court as for public purposes, their validity would not have been sustained, as otherwise the taxes which were necessary to be paid to support them would not have been validly levied, and in fact, this was the basis of the attacks on their validity. In the same way, the State of Missouri does not hesitate to admit that the Congress conceived the Home Owners' Loan Corporation for what it considered to be the public welfare and for public purposes. This, however, should not mean that its employees are exempt from state income taxes.

2. *The agency test—direction and control by the United States.*

The true test for determining tax immunity could hardly be based on whether or not the instrumentality claiming the exemption is technically an agent of the government, acting

on behalf of the government and under its direction and control. This important question of constitutional law would seem to rise above the confines of the law of principal and agent, and certainly such a test cannot be reconciled with the cases. How can it be reconciled with *Railroad Co. v. Peniston*, 18 Wall. 5 (1873), where the Court said:

"Admitting, then, fully, as we do, that the company is an agent of the General government, designed to be employed, and actually employed, in the legitimate service of government, both military and postal, does it necessarily follow that its property is exempt from State taxation?" 18 Wall. 32.

and where the Court answered this question in the negative? To the same effect is *Thomson v. Pacific Railroad*, 9 Wall. 579 (1869). Also compare *United States v. Strang*, 254 U. S. 491 (1921), involving the United States Shipping Board Emergency Fleet Corporation, which was admittedly an agent of the United States.

In *South Carolina v. United States*, Mr. Justice Brewer opened the opinion of the Court with the following statement:

"The important question in this case is, whether persons who are selling liquor are relieved from liability for the internal revenue tax by the fact that they have no interest in the profits of the business and are simply the agents of a State which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors." 199 U. S. 447.

In the American Law Institute's *Restatement of the Law of Agency*, agency is defined as follows:

"Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Section 1 (1).

Agency, and the agency test of tax immunity, have nothing to do with whether the entity acting as agent was created by the principal. They have only to do with, first, the agent acting under the direction and control of the principal, and second, the agent acting on behalf of the principal. But these factors of themselves have nothing to do with immunity from taxation of the agent, as the cases just cited show. Apparently no point was even made in *South Carolina v. United States*, *supra*, that the mere fact that the agency relationship existed was sufficient to confer immunity, but then, in *Railroad Co. v. Peniston*, *supra*, the point was squarely made as the Court stated in the quotation above, and it was squarely answered that agency does not mean tax immunity.

How could any other rule be adopted? Rigid governmental supervision has no reasonable connection with tax immunity. If it had, how would it fit into the picture cases like *Susquehanna Power Co. v. State Tax Commission*, 283 U. S. 291 (1931), and *Broad River Power Co. v. Query*, 288 U. S. 178 (1933), involving rigidly supervised licensees of the Federal Power Commission, or *Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17 (1934), involving a government supervised warehouseman? What of the Board of Trustees of the Elevated Railway in *Helvering v. Powers*, 293 U. S. 214 (1934), who were certainly agents of the Commonwealth in every sense of the word? (and let it be noted here that even if the Railway Company in that case could have been regarded as a continuing private enterprise, its trustees certainly were public officials). How would all of the other entities rigidly supervised and regulated by the government fit into this theory, like the railroads, the banks, and the stock exchanges?

The State of Missouri does not deny that the Home Owners' Loan Corporation acts, in a sense, as an agent of the United States. It owes its very existence to an Act of Congress, but do not also the agents and licensees in the cases which have been cited in this point also owe their existence to Acts of Congress? If no other case on the subject had been decided except *Helvering v. Powers*, *supra*, is not that case the plainest possible illustration of an agent of the Commonwealth

in every sense of the word, appointed by the governor and taking oath as a public official, and yet held subject to federal income taxes? And if it be asserted that because the Home Owners' Loan Corporation is to some extent supervised by officials appointed by the President of the United States, this confers tax immunity on its employees, how can be explained the presumed absence of tax exemption of employees of a railroad subject to the supervision of the Interstate Commerce Commission, or a stock exchange under the supervision of the Securities and Exchange Commission?

3. *Creation by the government—corporations.*

There is no doubt of the right of the federal government to exercise its powers through corporations which it creates, but the fact that a corporation owes its existence to the United States, acting through an Act of Congress, has nothing to do with the immunity of that corporation's employees from state taxes.

It seems that the very reason that the United States sometimes acts through corporate *media* is to divorce the corporation from the United States Government. In *United States v. McCarl*, 275 U. S. 1, 8 (1927), the Court said:

"Indeed, an important if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States."

Compare also *United States v. Strang*, 254 U. S. 491 (1921), and *Baltimore Shipbuilding & Dry Dock Co. v. Baltimore*, 195 U. S. 375 (1904). The very idea of creating the corporations seems to be to keep them from being too closely identified with the government. Thus the fact that the Home Owners' Loan Corporation was created by the United States and chartered under an Act of Congress should have nothing to do with its immunity from state taxes.

4. Government ownership of corporations.

The stock of the Home Owners' Loan Corporation is owned by the United States, subscribed for by the Secretary of the Treasury. But stock ownership in a corporation, whether it be created by the government or not, has nothing to do with tax immunity. The stockholders are not the corporation.

In *Federal Land Bank of St. Louis v. Priddy*, 295 U. S. 229 (1935) it was contended that government ownership of the stock of a Federal Land Bank made the bank exempt from the service of process. Mr. Justice Stone disposed of the argument as follows:

"But the liability to judicial process cannot be thought to fluctuate with the varying amount of the government investment. See *Sloan Shipyards Corp. v. U. S. Shipping Bd. Emergency Fleet Corp.*, 258 U. S. 549, 566." 295 U. S. 232n.

The same principle would seem to apply in *Railroad Co. v. Peniston*, 18 Wall. 5 (1873), and *Thomson v. Pacific Railroad*, 9 Wall. 579 (1869), where the United States held a mortgage lien on the properties of the companies. Also compare *Baltimore Shipbuilding & Dry Dock Co. v. Baltimore*, 195 U. S. 375 (1904), in which it was held that the fact that the United States had a right to have the property revert to its ownership under certain conditions was insufficient to confer tax exemption. And if any further consolidation of this argument is necessary, it is only necessary to quote from Chief Justice Marshall in *The Bank of the United States v. The Planters' Bank of Georgia*, 9 Wheat. 904, 907-908 (1824):

"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives it descends to a level with those with whom it associates itself, and takes

the character which belongs to those associates, and to the business which is to be transacted. * * * As a member of a corporation, a government never exercises its sovereignty. * * *

"The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter."

Thus the ownership by the United States of the stock of the Home Owners' Loan Corporation cannot confer on its employees tax immunity.

5. *Exemption by Act of Congress.*

Section 1463 (c) of the Home Owners' Loan Act of 1933 (June 13, 1933, c. 64, sec. 4, 48 Stat. 129, as amended), which purports to confer certain tax exemptions in connection with the Home Owners' Loan Corporation, contains the following:

"The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed."

It is submitted that this statute does not confer any exemption from income taxation on relator for two reasons: First, because the Congress cannot withdraw from the state taxing power a subject which is not so withdrawn by the Constitution, and second, even if the Congress did have such a power, this statutory exemption not only does not exempt

relator's income from taxation, but, by implication, says that such income is taxable.

As to the first of these points, the United States and the states are sovereign governments, and the taxing power of each is only curtailed by the United States Constitution. In other words, except in so far as the Constitution curtails the state taxing power, it could not be said that the state is an independent sovereign if the Congress could go further than the Constitution goes in withdrawing certain subjects from state taxation. Unless the Constitution, as interpreted by this Court, forbids the tax, what right has the Congress to forbid it?

As to the second point, even assuming that the Congress could withdraw from the state taxing power a subject which the Constitution of the United States does not so withdraw, the federal statute above quoted militates against relator. The statute exempts only the Corporation's "franchise, its capital, reserves and surplus, and its loans and income." Under familiar principles, the inclusion of certain named subjects in a statute impliedly excludes others not named, and this is especially true of statutes creating exemptions from taxation, which are strictly construed against those claiming them. *Vicksburg, Shreveport & Pacific R. Co. v. Dennis*, 116 U. S. 665 (1886); *Heiner v. Colonial Trust Co.* 275 U. S. 232 (1927).

Thus if it was necessary for the Congress explicitly to declare an exemption from taxation, and if such an exemption could be declared which would enlarge the exemption compelled under the Constitution, this statute excludes the exemption claimed by relator.

6. *Immunity of the instrumentality does not necessarily confer immunity on its employees.*

Until the decision in *New York ex rel. Rogers v. Graves*, *supra*, there was some question whether the immunity of the governmental instrumentality necessarily compelled the immunity from income taxes of income received from it by its employees. Cf. *Metcalf & Eddy v. Mitchell*, *supra*. In the *Rogers* case that question was presumably settled with the following language:

"The railroad company being immune from state taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune." 299 U. S. 408.

In *Brush v. Commissioner, supra*, the Court, after stating the question to be if the water system was created and conducted in the exercise of the city's governmental functions, said:

"If so, its operations are immune from federal taxation and, as a necessary corollary, 'fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune.' " 300 U. S. 360.

However, in *Heisler v. Gerhardt, supra*, the Court, "expressing no opinion whether a Federal tax may be imposed upon the Port Authority itself," decided that a tax could be imposed upon the income of its employees, rejecting the principle announced in the quotations from the *Rogers* and *Brush* cases. Thus immunity of the income of employees of a governmental instrumentality no longer follows from immunity of the instrumentality itself, and even if the Home Owners' Loan Corporation is deemed non-proprietary and essentially governmental, relator is not for that reason necessarily immune from the state tax in the case at bar. If the *Gerhardt* case could be decided as it was, without deciding if the Port Authority itself was immune, the instant case can likewise be decided adversely to the asserted immunity, without deciding if the Corporation is immune. Considerations of remoteness between a tax on employee income and the burden on the employer are surely of equal relevance for state and federal instrumentalities. By hypothesis, remoteness disregards the nature of the function, and the suggested difference between the factors determining a supposed difference between state and federal instrumentalities is confined to the nature of their functions only.

7. Other attributes as the basis of immunity.

Except for a ruling that the doctrine of *South Carolina v. United States* applies to federal instrumentalities, every factor recited in recent decisions as destructive of immunity is present in the case at bar. The opening language of that part of the opinion in the *Dravo* case dealing with the burden on the Government of the tax there considered states: (1) "The tax is not laid upon the Government, its property or officers," (2) "the Tax is not laid upon an instrumentality of the Government," (3) "the tax is non-discriminatory," and (4) "the tax is not laid upon the contract of the Government." Each of these propositions is equally true in the case at bar. The tax in this case will no more increase the cost of government than the tax in the *Dravo* case. The burden on the Government is no more direct here than there. Here is concerned no burden on the borrowing power of the Government, and no question of a state officer as distinguished from an employee, which seemingly were regarded in the *Gerhardt* case as entitled to special consideration. The money for the payment of relator's compensation was presumably derived largely or wholly from private funds, furnished by purchasers of Home Loan Bonds and not from public funds, a factor emphasized in *Helvering v. Therrell, supra*, and the ultimate security therefor rested on private homes, with the Corporation created for the benefit of a special class, those who own their own homes. The assistance of this class is certainly not an "essential" attribute of sovereignty, in the sense which would be considered decisive in a claim of a state instrumentality from federal taxation under *Helvering v. Gerhardt*. It seems to follow, therefore, that unless every constitutionally created federal corporation, regardless of its purpose, or the nature of its function, is immune from state taxation, and unless an income tax immunity of the employees of every such corporation follows inevitably and as a corollary to the immunity of the instrumentality, the income of relator is not exempt from the tax sought here to be assessed. Surely such a conclusion would make the dual concept of state and federal sovereignty more illusory than real, for if the federal tax power is more important to it

existence than conceptual and theoretical aspects of state immunity, as emphasized in the *Gerhardt* case, and if the remoteness of the burden is decisive, in the case of an individual claiming an exemption from a federal tax, are not these considerations equally important and relevant, and decisive, as applied to state sovereignty?

CONCLUSION.

South Carolina v. United States was decided at a time when certain states were engaging in activities which a few years before would have been considered extraordinary. Before that time the principle of immunity had been considered absolute and without qualification. The Court envisaged the situation thus:

"The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance v. W. A. Vandercook Co., No. 1*, 170 U. S. 438. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down.

"More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system. Would the State by taking into possession these public utilities lose its republican form of government?

"We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens

will be subserved. If this change should be made in any State, how much would that State contribute to the revenue of the Nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.

"Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government." 199 U. S. 454-455.

The true basis of the limitation established in that case was the fear that by engaging in untraditional activities the states would withdraw so many subjects from the federal taxing power as to cripple the federal government.

Now the situation is reversed. The federal government is now engaging in so many new activities in new fields that if their scope had been pointed out to one living at the turn of the century, he would doubtless have been far more astonished and fearful than was Mr. Justice Brewer when he wrote the opinion in *South Carolina v. United States* in 1905. Partial lists of federal corporations are contained in Van Dorn, *Government-Owned Corporations* (1926); Schmeckebier, *New*

Federal Organizations (1934); and Culp, *Creation of Government Corporations* (1935), 33 Mich. L. Rev. 473.

The Court could conceivably dispose of this case by holding that because the relator is an employee of an instrumentality of the United States, his income from that instrumentality is exempt from state taxation because there can be no constitutional federal enterprise which would not be unduly burdened by the imposition of a state income tax on the income of any of its employees. Surely such a result would be unfair to the states. It could also hold that there is no more necessity in the case at bar of deciding whether the instrumentality is, because of its function, exempt from state taxation than there was of deciding whether the Port Authority in the *Gerhardt* case was exempt, and that the tax could be assessed because of the remote and indirect burden of this income tax on the Government of the United States. This would seemingly eliminate entirely the immunity of an employee of a state or of the federal government from income taxes assessed by the other government, because if the decision should be placed on the ground of remoteness, the nature of the function of the instrumentality would be irrelevant. A third, and it is submitted, the fairest decision, and one which would be entirely consistent with all of the previous decisions of this Court, would be to hold that the doctrine of *South Carolina v. United States* applies equally to state and federal instrumentalities. This Court is almost thirty-four years has not found any necessity of revising the doctrine of *South Carolina v. United States* as applied to state instrumentalities, and if it is now declared to apply also to federal instrumentalities, no more difficulties in its application to future cases involving federal instrumentalities should arise than have arisen since 1905. If the federal government chooses to enter the field of private banking, then, if the states are sovereigns in the same sense in which the federal government is a sovereign, no reason of logic or precedent would seem to bar the application of non-discriminatory state income taxes to the income of employees of that instrumentality, and every argument which supported the

decision in *South Carolina v. United States* would be present, militating against the claim of immunity. Logic, precedent, and fairness to state sovereignty and to the states' need of revenue, comparable in every respect to the national government's need of revenue, impel a decision in favor of Petitioners.

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1. **IDENTIFICATION**

2. **DESCRIPTION**
3. **CLASSIFICATION**
4. **REMARKS**

5. **REFERENCE**
6. **NOTES**

7. **DATE**
8. **SIGNATURE**

9. **REMARKS**

10. **DATE**

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 478

MARK GRAVES, JOHN J. MERRILL, AND JOHN P.
HENNESSY, AS COMMISSIONERS CONSTITUTING THE
STATE TAX COMMISSION OF THE STATE OF NEW
YORK, PETITIONERS

v.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE
RELATION OF JAMES B. O'KEEFE

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF NEW YORK*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The decision and opinion of the State Tax Commission of New York appear at R. 8-13. The opinion of the Appellate Division of the Supreme Court of New York (R. 45-50) is reported in 253 A. D. 91. The memorandum opinion of the Court of Appeals of New York (R. 1) is reported in 278 N. Y. 221.

JURISDICTION

Pursuant to remittitur from the Court of Appeals (R. 1), the judgment of the Supreme Court of New York was filed on August 19, 1938 (R. 2). The petition for a writ of certiorari was filed on November 18, 1938, and was granted on December 19, 1938. Jurisdiction rests on Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The taxpayer is an employee of the Home Owners' Loan Corporation who seeks refund of income tax paid to the State of New York on his salary for the year 1934. The questions are:

1. Whether the compensation is exempt under the state statute, and whether that question may be considered here. If not, the further questions are:

2. Whether the Home Owners' Loan Corporation exercises "proprietary" or "nonessential" functions.

3. Whether a government employee has any constitutional immunity from a net income tax upon his salary.

4. Whether the silence of Congress means that such a tax immunity can be claimed by federal employees.

STATUTE INVOLVED

Section 4 of the Home Owners Loan Act of 1933, as amended, is printed in the Appendix to the petition for a writ of certiorari (pp. 34-52).

The Tax Law of New York (c. 59, McKinney's Consolidated Laws) provides:

SEC. 351. *Imposition of income tax.*—A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: * * *

* * * * *

SEC. 357. *Net income defined.*—The term "net income" means the gross income of a taxpayer less the deductions allowed by this article.

* * * * *

SEC. 359. *Gross income defined.*—The term "gross income":

1. Includes gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, * * *.

2. Does not include the following items which shall be exempt from taxation under this article:

* * * * *

f. Salaries, wages and other compensation received from the United States of¹ officials or employees thereof, including persons in the military or naval forces of the United States.²

¹ The word "of" is not in the consolidated Tax Law, but appears in the original act, L. 1919, c. 627, Sec. 359-2-f.

² Subdivision f was repealed by the Act of May 28, 1937, L. 1937, c. 719, but the repeal was effective only as of that date.

STATEMENT

The taxpayer filed a resident income tax return for the calendar year 1934 in which he reported a total net income of \$2,908.54, upon which he paid a tax of \$57.28 to the State of New York. Of his total income, \$2,246.66 was salary received as an attorney employed by the Home Owners' Loan Corporation; if this salary were excluded, his taxable net income would be less than the \$1,000 personal exemption and no tax would be due (R. 41). The taxpayer duly filed a claim for refund and a hearing was had before officials of the State Tax Commission (R. 8). The claim was denied (R. 8-13). On writ of certiorari, the Appellate Division, Third Department, annulled this determination, two judges dissenting. On appeal, the decision of the Appellate Division was affirmed by the Court of Appeals (R. 1).

The taxpayer received an oral appointment as examining attorney of the Home Owners' Loan Corporation at a salary of \$2,400 per year; in 1934 he received payment for work commencing on January 25^{*} (R. 17, 21). He took a prescribed oath of office (R. 19, 39), but was exempted from Civil Service and other acts regulating federal employment (R. 19, 32). The United States Employees'

^{*} He started work on January 12, 1934, but was not paid for the period January 12-25 until 1935 (R. 17). This payment, of \$80, apparently explains the mistaken statement in the opinion of the State Tax Commission that his salary was \$80 a month (R. 9-10).

Compensation Commission has ruled that employees of the Home Owners' Loan Corporation are civil employees of the United States within the meaning of the Federal Employees Compensation Act (R. 40).

The taxpayer's duties consisted in examination of applications for loans, to see that they met the requirements of the Act and Regulations and to ensure that the Home Owners' Loan Corporation received a first lien on the property (R. 18). He worked from 9 to 5 on week days, and from 9 to 12 on Saturdays (R. 17).

SUMMARY OF ARGUMENT

I

The New York statute exempts "compensation received from the United States of officials or employees thereof." While we think it plain enough that the relator is exempted under this provision, the question seems to be one of state law, and thus to be beyond the power of this Court to decide in reviewing the decision of the state court on the federal question.

II

The Home Owners' Loan Corporation cannot be said to exercise "proprietary" or "nonessential" functions of the United States. The federal government can exercise only its delegated powers, and if the activity is constitutional it must by definition be governmental. Such is the clear teaching of the

decisions of this Court. *McCulloch v. Maryland*, 4 Wheat. 316, 432; *Van Brocklin v. Tennessee*, 117 U. S. 151, 158-159; *South Carolina v. United States*, 199 U. S. 437, 451-452; *Helvering v. Therrell*, 303 U. S. 218, 223. Any other rule would seem to threaten calamitous consequences in the operations of the federal government and would reverse a century and a half of constitutional practice.

In this there is no departure from the rule that the doctrine of tax immunity protects the states and the nation alike. By the very nature of the constitutional system, a federal tax contains no danger for the states, who are represented in Congress, while this safeguard is absent in the case of a state tax. *McCulloch v. Maryland*, *supra*, 435-436; *Helvering v. Gerhardt*, 304 U. S. 405, 412-413, 416. So far as petitioners object that this gives the national government, in the exercise of its delegated powers, an ascendancy over state governments, it is a sufficient answer that the supremacy clause of Article VI settled that question in 1789.

The corporate nature of the H. O. L. C. is immaterial in this inquiry. Its stock is wholly owned by the United States and its functions are those of the Government alone. And since there is, and can be, no challenge to the constitutionality of the H. O. L. C. in these proceedings, its activities must be taken to be purely governmental and in all respects those of the United States itself.

III

The question, then, is whether an employee of the United States is exempt from a nondiscriminatory state income tax. Since Congress has not acted, the question relates only to the implications of the Constitution. We submit that there is no constitutional immunity from a tax such as this.

A. The Court has four times held an officer of a state or the federal government exempt from taxation by the other; it has never held an employee to be exempt. If there be a distinction between the tax status of employees and officers, no case stands in the way of our argument. But if, as we believe, no such distinction can be drawn, our position is contradicted by *Collector v. Day*, 11 Wall. 113. We ask that the decision there be reconsidered.

B. The decision was erroneous at the time it was decided. It ignored that, with knowledge of tax-immunity problems, the Constitution provided no relevant limitation upon the federal taxing powers. It reversed the reasoning of the prior decisions of this Court holding state taxes invalid solely because of the supremacy clause. It ignored Chief Justice Marshall's insistence that the representation of the states in Congress made unnecessary a constitutional protection. And it opened wide fields for unnecessary and unfair tax exemptions,

which the Court has since been required steadily to narrow.

C. *Collector v. Day* cannot be reconciled with the subsequent decisions of the Court. The opinion in *Helvering v. Gerhardt*, 304 U. S. 405, seems broad enough to reach all state employees; there is no reason to treat the officer differently. Independent contractors are subject to taxation on both their net and their gross income. *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *James v. Dravo Contracting Co.*, 302 U. S. 134. In spite of express constitutional provisions, the states may impose a net income tax on interstate commerce and Congress may lay one on the exporting business. *United States Glue Co. v. Oak Creek*, 247 U. S. 321; *Peck & Co. v. Lowe*, 247 U. S. 165. Perhaps equally important is the general trend in the decisions of the Court, which increasingly serve to limit the doctrine of immunity to its proper borders.

D. There is no practical justification for the immunity. The government officer or employee receives all the benefits of organized government and plainly should pay his share of its costs. The tax for a number of reasons contains no threat to the operations of Government: It is not certain that the government salary will be taxed at all if included in gross income. The exemption privilege operates in a variable and discriminatory manner. It is clear almost beyond dispute that few, if any, persons considering government work would have

their decision shaped by immunity or liability to income tax. Even if the exemption were to be reflected in the public treasury, there is doubt that such a bounty should be offered by one government to another. The requirement that the tax be non-discriminatory eliminates any danger of interference with government operations.

E. Each of the three reasons advanced or suggested by the Court for the decision in *Collector v. Day* have subsequently been rejected: (1) The power to tax can no longer be thought to involve the power to destroy. In half a hundred cases the Court has sustained taxes which would be capable of destruction if pressed to discriminatory or oppressive limits, and the Court has expressly decided that the states could tax federal activities which they could not regulate or forbid. *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; *New Brunswick v. United States*, 276 U. S. 547. (2) A nondiscriminatory net income tax can no longer be considered to be an interference with the governmental functions in which the officer or employee is engaged. (3) Finally, after the decisions in *New York ex rel. Cohn v. Graves*, 300 U. S. 308, and *Hale v. State Board*, 302 U. S. 95, the tax upon net income can no longer be thought to be a tax on the source of the income.

F. Only one other reason has been advanced in the decisions of the Court to support an immunity of a private person from a nondiscriminatory tax

because he deals with the Government. This is the fear that the economic burden of the tax might be passed on to the Government. But this no longer can be accepted as a ground for extending immunity from such a tax. *James v. Dravo Contracting Co.*, 302 U. S. 134, 160; *Helvering v. Mountain Producers Corp.*, 303 U. S. 376; *Helvering v. Gerhardt*, 304 U. S. 405, 418-419, 420-421. In any event, there is no discernible tendency for an income tax upon an officer or employee to increase the costs of government.

G. Finally, the reasons announced by the Court for denying a claim of immunity are fully applicable to the Government officer. The tax in question is nondiscriminatory and falls within the emphasis given this factor in the recent decisions of the Court. The necessity that the tax revenues be maintained finds fitting illustration in the case of the officer and employee, whose exemption deprives states and the nation of millions of dollars in annual tax revenues. The officer and the employee should in justice pay his share of the costs of the benefits of organized government which he receives. The tax, if indeed it has any effect upon the government, has one which at most is conjectural and remote.

H. Foreign federations with similar problems have first adopted and have then rejected the rule of *Collector v. Day*. In Canada the provincial courts at the outset unhesitatingly followed the

American cases. Then first the Privy Council and subsequently the Supreme Court of Canada abandoned the rule, and held the income of a government officer to be taxable. *Webb v. Outtrim*, (1907) A. C. 81; *Abbott v. City of St. John*, 40 Can. Sup. Ct. 597. In Australia the provincial courts first held the government officer liable to taxation, as did the Privy Council in *Webb v. Outtrim*. The Federal High Court, however, held to the contrary. *D'Emden v. Pedder*, 1 C. L. R. 92. Other cases reinforced the rule of reciprocal immunity of the High Court. But in 1920 this doctrine was cleanly reversed. *Amalgamated Society of Engineers v. Adelaide Steamship Co., Ltd.*, 28 C. L. R. 129. And in 1937 the High Court definitely announced its abandonment of the rule that a Government salary was immune from income taxation by the other government. *West v. Commissioner of Taxation*, 56 C. L. R. 657.

IV

Since the Constitution of its own force does not exempt the federal officer or employee from a non-discriminatory income tax upon his salary, and since Congress has provided neither exemption nor liability, the only question remaining is whether an intention on the part of Congress to exempt the salary from such taxation is to be implied from its silence.

The doctrine developed in the somewhat analogous field of interstate commerce, that the silence of Congress may mean an intention that there be immunity from state regulation, has no application here. There is no corresponding practical utility in permitting the operation of state legislation to remain within the control of Congress; Congress has already a full power to return the subject to state control, since the immunity may at any time be waived. Even if the analogy were adopted, however, there should be no implied intention to exempt, since a nondiscriminatory net income tax upon federal salaries has no effect whatever on the operations of the United States.

The decisions of this Court have, in any event, settled the matter. In forty-odd cases the states have been permitted to tax private persons who dealt with the Government. In no case has the silence of Congress been thought to imply a desire that there be exemption; the decisions of immunity have been pitched on the Constitution alone. In many opinions the Court has expressly relied upon the failure of Congress to provide exemption as a reason why the tax should be sustained. And certainly if the gross receipts tax on the government contractor, sustained in *James, v. Dravo Contracting Co.*, 302 U. S. 134, was not to be thought condemned by the silence of Congress, a tax so remote from the operations of government as an income

tax upon the salaries paid officers and employees is not to be thought forbidden by an implication derived from the silence of Congress.

The possible argument that Congress by its silence has accepted the rule of immunity announced in *Collector v. Day*, 11 Wall. 113, as applied to federal officers and employees, cannot be allowed. Although applicable with respect to immunities declared under the commerce clause (see *Gwin, White & Prince, Inc. v. Henneford*, No. 75, October Term, 1938, decided January 3, 1939), there is no corresponding responsibility on the part of Congress to provide the applicable rule in the case of the immunity claimed by the federal employee. Moreover, it hardly can be expected that Congress would waive the immunity of federal officers and employees so long as *Collector v. Day* was thought to bar a corresponding tax upon those of the states; however undesirable the immunity might be, there would have been no occasion for Congress to accentuate the unfair privileges enjoyed by state officers and employees. The Court, in any event, has not found any adoption by Congress of the rule announced in overruled cases, *Fox Film Corp. v. Doyal*, 286 U. S. 123, or of the rule theretofore thought to follow from decisions in analogous cases, *James v. Dravo Contracting Co.*, *supra*.

7

ARGUMENT

I

THE TAXPAYER'S EXEMPTION UNDER THE STATE
STATUTE

It seems desirable at the outset to dispose of the question which arises under Section 359-2-f of the Tax Law of New York (McKinney, c. 59). That section provides that "the term 'gross income' * * * Does not include the following items which shall be exempt from taxation under this article: * * * Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States."

We think it plain enough that an employee of the Home Owners' Loan Corporation is an employee of the United States, and that the H. O. L. C. is simply a branch of the Government which has been created in corporate form.

However, the exemption is a privilege extended by the state statute and the scope of the privilege is a question which relates to the construction of that statute. There is involved no question of the extent of the jurisdiction or rights granted the United States,* since the statute relates only to the tax liability of the employee. It seems to follow that the

* Compare *Mason Co. v. Tax Commission*, 302 U. S. 186, 197; *United States v. Perkins*, 163 U. S. 625, 630-631.

construction of Section 359-2-f is a question of state law.^a

The state court did not consider this state question. The taxpayer was denied exemption by the Tax Commission, both because there was no constitutional immunity and because there was no statutory exemption (R. 13). The Appellate Division reversed, and was affirmed by the Court of Appeals only because of the supposed error of the Tax Commission in the decision of the question under the federal constitution; the state question was not considered.^c It results that the state ground, inde-

^a It may be argued that the application of Section 359-2-f is a federal question because the statute intended to adopt the federal rule as to what constitutes an employee of the United States. This probably was the intention of the legislature, since there is no reason why the State would wish to make an independent determination of the relationship of the United States to federal employees; further, the opinions of the Attorney General of New York construing this section have relied exclusively upon federal cases and statutes. Op. A. G., 1919, p. 306; Op. A. G., 1920, p. 204; Op. A. G., 1933, p. 261. But, even if there were this adoption of the federal rule, the question apparently remains one of state law. *Milner's Executors v. Swann*, 150 U. S. 132, 136-137; *Louisville & Nashville R. R. v. Western Union Tel. Co.*, 237 U. S. 300, 303; see *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 507; but compare *Mackenzie v. Hare*, 239 U. S. 299.

^c Neither the majority of the Appellate Division nor the Court of Appeals wrote an opinion but entered *per curiam* decisions which merely cited *New York ex rel. Rogers v. Graves*, 299 U. S. 401 (R. 45, 1). In that case, the Appellate Division, 3d Dept., stated that the relator had not invoked Section 359-2-f, and decided only the constitutional question. *People ex rel. Rogers v. Graves*, 245 A. D. 452, affirmed without opinion, 271 N. Y. 543.

pendent and adequate to support the judgment, was not decided by the state court. This Court, therefore, has jurisdiction to review the case. In this review, if it agrees with our position on the federal questions, it will reverse the cause and remand it for consideration of the state question in the state court; if it concludes that the relator has a constitutional immunity against taxation, the decision of the state court should be affirmed. *Virginia v. Imperial Coal Co.*, 293 U. S. 15, 16-17; *Grayson v. Harris*, 267 U. S. 352, 358; *International Steel Co. v. Surety Co.*, 297 U. S. 657, 665-666. But, since the Court considers only federal questions on review of state courts,⁷ it will not consider whether the judgment might be supported by the exemption granted by Section 359-2-f, a question of state law.⁸

⁷ *Murdock v. City of Memphis*, 20 Wall. 590; *Detroit & Mackinac Ry. v. Paper Co.*, 248 U. S. 30, 31; *Missouri ex rel. v. Public Service Commission*, 273 U. S. 126, 131.

⁸ If, however, the Court should feel the question of the exemption of the state statute to be a federal question (whether because of the analysis suggested in footnote 5, *supra*, or for other reasons), it should then consider the scope of Section 359-2-f. Section 237 (b) of the Judicial Code (U. S. C., Title 28, Sec. 344) permits review on certiorari whether the federal claim be sustained or denied. Any federal claim adequately raised in the state court should thus be available to the respondent in support of the decision sustaining him on one ground. A contrary rule would make the jurisdiction of this Court depend upon the accident of whether or not the state court chose to make cumulative or unnecessary rulings in its opinion, and would be incongruous with the rule applicable to decisions of the lower federal courts. See *Langnes*

We proceed, therefore, to consideration of the question of the taxpayer's immunity without regard to the exemption of the state statute. We shall urge that there is no such immunity. If our views are accepted, it will result that the cause must be remanded to the state court for further proceedings, which will include determination of the scope of the statutory exemption.

II

THE HOME OWNERS' LOAN CORPORATION. DOES NOT EXERCISE "PROPRIETARY" OR "NONESSENTIAL" FUNCTIONS

Much of petitioners' brief is directed, somewhat obliquely, to the proposition that the relator is taxable because the Home Owners' Loan Corporation exercises functions which are proprietary or which are not essential to the operations of the United States. As we read their argument, it accepts *Helvering v. Gerhardt*, 304 U. S. 405, as settling that the income of some government employees may be taxed, restricts this holding to employees outside the regular governmental departments, and then expands it to have equal application to federal employees. We agree with petitioners' conclusion that the relator is taxable, but take emphatic issue

v. Green, 282 U. S. 531, 538-539; *Stelos Co. v. Hosiery Corp.*, 295 U. S. 237, 239. Compare *New York v. Kleinert*, 268 U. S. 646, 650-651; *Virginian Ry. v. Mullens*, 271 U. S. 220, 227-228; *Van Huffel v. Harkelrode*, 284 U. S. 225, 229.

with the reasons which they suggest for this conclusion.

We think that the taxing power of the state has precisely the same scope whatever the federal function which is urged to be affected, and that there can be no place for an argument that any federal function is "proprietary," or is not "essential" to the operations of the United States. This conclusion is compelled (a) by constitutional theory, (b) by the decisions of this Court, and (c) by the practical necessities of a federated government.

A. ALL DELEGATED POWERS ARE GOVERNMENTAL, AND ESSENTIAL
TO THE OPERATIONS OF THE UNITED STATES

Some of the older opinions contained intimations that the state immunity from taxation related only to "governmental functions."* This qualification was definitely established, by a divided Court, in *South Carolina v. United States*, 199 U. S. 437. The State had established dispensaries for the exclusive sale of liquor, and the Court sustained the imposition of the federal license tax. The Court assumed that the federal government could not, through taxation, "prevent a State from discharging the ordinary functions of government" (p. 451). But for fear "the National Government would be largely crippled in its revenues" (p. 455),

* Clifford, J., dissenting in *United States v. Railroad Co.*, 17 Wall. 322, 333-335; *Ambrosini v. United States*, 187 U. S. 1, 7-8; White, J., dissenting in *Snyder v. Bettman*, 190 U. S. 249, 255.

the Court denied the claim for immunity, placing some reliance upon the fact that functions such as these could not have been contemplated by the framers of the Constitution (p. 456).

The doctrine has been applied or considered in eight subsequent decisions of this Court.¹⁰ Most of the opinions which explain the doctrine are pitched on the practical fear that the expanding activities of the states would otherwise result in the withdrawal of fields of revenue to the point that the federal taxing power might largely be crippled.¹¹ The only other explanation which has been advanced is that the activity is essentially private or proprietary in character and so cannot be governmental.¹²

We are not here concerned with the philosophic adequacy of these explanations. It is sufficient

¹⁰ *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 173; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 172; *Ohio v. Helvering*, 292 U. S. 360; *Helvering v. Powers*, 293 U. S. 214; *Brush v. Commissioner*, 300 U. S. 352; *Helvering v. Therrell*, 303 U. S. 218; *Helvering v. Gerhardt*, 304 U. S. 405; *Allen v. Regents*, 304 U. S. 439; cf. *New York ex rel. Rogers v. Graves*, 299 U. S. 401.

¹¹ *South Carolina v. United States*, *supra*, 454, 455, 457; *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 173; *Helvering v. Powers*, 293 U. S. 214, 225; *Helvering v. Therrell*, 303 U. S. 218, 224; *Helvering v. Gerhardt*, 304 U. S. 405, 417; *Allen v. Regents*, 304 U. S. 439, 452, 453.

¹² *South Carolina v. United States*, *supra*, 463; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 172; *Ohio v. Helvering*, 292 U. S. 360-368-369; *Brush v. Commissioner*, 300 U. S. 352, 372; *Helvering v. Gerhardt*, 304 U. S. 405, 416; *Allen v. Regents*, 304 U. S. 439, 452.

that they can have no application to activities of the United States.

The Constitution delegates to the central government certain enumerated powers. Congress can exercise no power not granted. By definition, therefore, if the federal activity is constitutional, it lies within the delegated powers. And if the Constitution delegates a given power to the Federal Government it cannot be said that this power is not governmental, that it is proprietary, or that it is not essential to the operations of the United States. That question is one which was settled when the Constitution was adopted and cannot be reexamined now.

The states, on the other hand, have all the residuary powers of government. As we read the later decisions of this Court, there is no field of commercial or industrial activity forbidden to the states or their political subdivisions by the Federal Constitution.¹³ The exercise of the state powers in this regard, whether to a limited degree or to their fullest extent, may well be essential to the welfare of the state and its citizens. But any wide exercise of the unlimited powers of the states to displace private enterprise would raise a serious question as to federal revenue sources if immunity were to follow every state activity.¹⁴ This practical basis of

¹³ *Jones v. City of Portland*, 245 U. S. 217; *Green v. Frazier*, 253 U. S. 233.

¹⁴ See, particularly, *South Carolina v. United States*, *supra*, 454; *Helvering v. Gerhardt*, 304 U. S. 405, 416.

the rule is absent when the activities are those of the Federal Government, undertaken under its delegated powers. It is true that the scope of federal activities under the delegated powers have considerably expanded in recent years. But the comparatively greater readiness of Congress to waive immunity, which this Court has noted (*infra*, p. 33), shows the threat to the revenue of the states not to be formidable.

B. THE DECISIONS OF THIS COURT FORBID APPLICATION OF THE DOCTRINE TO FUNCTIONS OF THE UNITED STATES

No one of the nine cases which consider the doctrine of proprietary or nonessential functions has applied it to functions of the United States. Many decisions make it plain beyond dispute that there can be no such segregation of the federal activities.

In *McCulloch v. Maryland*, 4 Wheat. 316, 432, Chief Justice Marshall refused to distinguish between the privately operated Bank of United States and the purely "governmental" functions of the United States. "If the states may tax one instrument," he said, "employed by the government in the execution of its powers, they may tax any and every other instrument." In *Van Brocklin v. Tennessee*, 117 U. S. 151, the Court held that the states could not tax lands acquired by the United States on their sale for delinquent federal taxes; it said (pp. 158-159):

The United States do not and cannot hold property, as a monarch may, for private or

personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, "to pay the debts and provide for the common defence and general welfare of the United States." Constitution, art. 1, sect. 8, cl. 1; *Dobbins v. Erie County Commissioners*, 16 Pet. 435, 448. * * *

This reasoning has been followed with specific reference to the doctrine of proprietary or nonessential functions of states. In *South Carolina v. United States*, *supra*, 451-452, the Court directly said:

Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging *the ordinary functions of government*, just as it follows from the second clause of Article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of *all the powers* conferred upon it. [Italics added.]

This rudimentary distinction between the functions of the federal and the state governments is still recognized. Such is the clear teaching of *Helvering v. Therrell*, 303 U. S. 218, 223, where the Court said:

The Constitution contemplates a national government free to use its delegated powers; also state governments capable of exercising their essential reserved powers; * * *

Among the inferences which derive necessarily from the Constitution are these: No State may tax appropriate means which the United States may employ for exercising their delegated powers; the United States may not tax instrumentalities which a State may employ in the discharge of her essential governmental duties * * *

The Minnesota court, in *Geery v. Minnesota Tax Commission*, 282 N. W. 673, recently reached the same conclusion. It held the salary of an officer of a federal reserve bank immune from State taxation, despite the decision in *Helvering v. Gerhardt*, 304 U. S. 405, because "the distinction between the immunity granted to federal delegated powers, and that given to the essential governmental duties exercised by the states seems clear."

Perhaps as significant as the express statements of this Court is the fact that the opinions uniformly speak of the doctrine in terms of state functions only, and that no one of the cases dealing with the doctrine of proprietary or nonessential functions speak of this limitation upon tax immunity as reciprocal.

The only possible exception to this statement is *New York ex rel. Rogers v. Graves*, 299 U. S. 401. From that opinion can be drawn an implication that the Court viewed the question for decision as whether the Panama Railroad was exercising governmental or proprietary functions. But the opinion is at least equally capable of a construction

such that the issues discussed related to the constitutionality of the undertaking, or was designed to bring the case within the rule of *Clallam County v. United States*, 263 U. S. 341, 345. We shall not stop to weigh the opposing inferences, since it is clear that the construction which accords with all other decisions in the field must be adopted in preference to that which contradicts them.

C. THE PRACTICAL CONSEQUENCES OF A DECISION THAT THE UNITED STATES EXERCISES PROPRIETARY OR NONESSENTIAL FUNCTIONS

In addition to the plain dictates of constitutional theory and the decisions of this Court, the proposition advanced by petitioners must be rejected because of the alarming if not catastrophic consequences which would result from its adoption.

The difficulties would only to a limited degree be traced to the added tax burdens. While the Federal instrumentality which we here suppose to be described as proprietary would not have the added protection of taxation by its own representatives (see *infra*, pp. 31-33), it may be supposed that its functions would not be embarrassed by the added cost of a nondiscriminatory tax, imposed on all persons alike. The problem is very likely not unduly accentuated by the fact that the Federal instrumentality would ordinarily be operating on a nation-wide scale, and forced to take into reckoning the diversified taxes of 48 states.

The really serious danger in petitioner's position lies in the field of substantive regulation. If a

Federal activity were ever characterized as proprietary or nonessential, such as to subject it to state taxation, there is no readily apparent theory why it would not also be subject to the regulatory laws of the several states.¹⁵ To subject the United States, in the performance of its constitutional functions, to the laws of the several states is an unthinkable result, and one so clearly unconstitutional that we need not dwell on the interference with or, indeed, the complete frustration of many federal activities which would result.¹⁶ The complete reversal of constitutional history, and of the express mandate of Article VI, cannot be accomplished by pointing to a vague demarcation of governmental powers into proprietary and essential. Whatever the activity, so long as it be constitutional, it is removed from the field of state laws by the unmistakable provision that "the laws of the United States * * * shall be the supreme law of the land."

Finally, one need only point to the national banks, the Federal Reserve Banks, the diversified operations of the institutions under the control of

¹⁵ The Federal taxing power, although equally bulwarked by the supremacy clause, does not reach as far as the Federal regulatory powers. See *Board of Trustees v. United States*, 289 U. S. 48; *United States v. California*, 297 U. S. 175.

¹⁶ The cases cited in footnote 15, *supra*, show that there is no comparable problem with respect to state functions, which are subject, whatever their nature, to the Federal regulatory powers.

the Farm Credit Administration, the United States Postal Savings System, and the other institutions under the control of the Federal Home Loan Bank Board, to indicate the startling implications of petitioners' argument (see Br. 12, Pet. 28) that the banking or lending activities of the United States are to be characterized as proprietary or nonessential." Congress could, of course, expressly immunize these institutions from state control and state taxation (see *infra*, pp. 34-35). But it needs no elaboration to show that such a course has never been thought necessary and that the practical difficulties in the way of foreseeing all of the varying forms of state regulation or taxation would make the process intolerably unsatisfactory.

D. PETITIONERS MISTAKE THE NATURE OF "RECIPROCAL" TAX IMMUNITY

Throughout the brief of petitioners there runs the main thread of their argument; it consists in the proposition that the doctrine of tax immunity is reciprocal, and that a tax immunity or liability with respect to one government, or with respect to those who deal with it, applies automatically to the taxing power of the other government. We do not

¹⁰ The brief for the United States, intervenor, in *Loomis v. First Federal Savings and Loan Association*, No. 277, this Term (dismissed on motion for petitioners, January 16, 1939) lists and classifies (pp. 11-15) some 38 separate financial agencies of the United States, comprising about 15,000 separate corporations or organizations, with assets of about \$44,000,000,000.

take issue with the principle that tax immunity is reciprocal. We insist, however, that the loose concept of reciprocity cannot be wrenched from the cases in which it was used and made into a mechanical test by which to determine tax immunity or liability. The reciprocity can take form only under the Constitution, and its operation must be shaped by the differences which the Constitution sets up between the States and the nation. See *Geery v. Minnesota Tax Commission*, 282 N. W. 673, 674.

Of the eighty-odd opinions on tax immunity since the decision in *Collector v. Day*, 11 Wall. 113, the term "reciprocal" has been used, so far as we have found, in only one opinion.¹⁸ On the other hand, we recognize that many opinions speak of the tax immunity doctrine as applicable to *either* government,¹⁹ or reason that the immunity relating to the one applies for the same reason to the other government.²⁰ This is explained, typically, by the doc-

¹⁸ *Trinityfarm Co. v. Grosjean*, 291 U. S. 466, 471.

¹⁹ *Helvering v. Mountain Producers Corp.*, 303 U. S. 376; *United States v. California*, 297 U. S. 175, 184; *Fox Film Corp. v. Doyal*, 286 U. S. 123, 128; *Susquehanna Co. v. Tax Commission (No. 1)*, 283 U. S. 291, 294; *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 577; *Educational Films Corp. v. Ward*, 282 U. S. 379, 389.

²⁰ *James v. Dravo Contracting Co.*, 302 U. S. 134, 157; *Indian Motorcycle Co. v. United States*, *supra*, 577, 579; *Metcalf & Eddy v. Mitchell*, 209 U. S. 514, 521; *Farmers Bank v. Minnesota*, 232 U. S. 516, 527; *Snyder v. Bettman*, 190 U. S. 249, 254-255; *Ambrosini v. United States*, 187 U. S. 1, 7; *Polluck v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 584-586.

trine that the independence of the state governments in their spheres is equally important, and equally assured by the Constitution, as is the independence of the Federal Government."²¹ We accordingly assume that petitioner's plea for a strictly "reciprocal" tax immunity is based upon the recognized doctrine which ensures "the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system" (*Helvering v. Powers*, 293 U. S. 214, 225).

When the doctrine is phrased in this more accurate language, it offers much less support to the bold position of petitioners. The doctrine of tax immunity is fully reciprocal so far as it affords mutual protection to the state and national governments within their respective spheres. But this by no means is the equivalent of saying that a particular type of tax must necessarily and automatically be given the same treatment without consideration of whether it be imposed by the federal or by a state government. The federal government acts through the representatives of all the states, but it has no representative in the state legisla-

²¹ *James v. Dravo Contracting Co.*, *supra*, 150; *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 400; *Indian Motorcycle Co. v. United States*, *supra*, 575; *Educational Films Corp. v. Ward*, *supra*, 392; *Willcuts v. Burr*, 282 U. S. 216, 225; *Metcalf & Eddy v. Mitchell*, *supra*, 523; *Ambrosini v. United States*, *supra*, 7; *Plummer v. Coler*, 178 U. S. 115, 118; *Pollock v. Farmers Loan & Trust Co.*, *supra*, 584; *Railroad Co. v. Peniston*, 18 Wall. 5, 31.

tures. Thus, by the very nature of our constitutional system, a federal tax cannot have the same threat to state activities that a state tax might be supposed to have with regard to federal activities. In consequence of this basic concept of a federated system, the framers of the Constitution provided in Article VI that the acts of Congress should be the supreme law of the land. This was, as Madison put it in the Convention, because "Experience had evinced a constant tendency in the States to encroach on the federal authority," and, again, because "The necessity of a general Govt. proceeds from the propensity of the States to pursue their particular interests in opposition to the general interest."²² There was, accordingly, no dissent whatever in the Convention at the insertion of the supremacy clause.²³

Petitioners' assertion that the necessary preservation of mutual independence means a mechanical reciprocity is contradicted by a century and a half of constitutional history and by numerous decisions of this Court.

First, it is well to recall some of the salient facts of our constitutional practice. There is no more reason to suppose a mechanical identity of taxing powers than of regulatory powers. Yet under its commerce power the United States may deal with the states and their instrumentalities as with pri-

²² Farrand, *Records of the Federal Convention*, I, 164; II, 27.

²³ *Ibid.*, II, 22.

vate persons. *Board of Trustees v. United States*, 289 U. S. 48; *United States v. California*, 297 U. S. 175; see *United States v. Village of Hubbard*, 266 U. S. 474; *New York v. United States*, 257 U. S. 591. The states, in the exercise of their police powers, have no comparable authority over the activities of the United States. *Tennessee v. Davis*, 100 U. S. 257; *In re Neagle*, 135 U. S. 1; *Ohio v. Thomas*, 173 U. S. 276; *Boske v. Comingore*, 177 U. S. 459; *Johnson v. Maryland*, 254 U. S. 51; *Arizona v. California*, 283 U. S. 423, 451-452. The states, of course, have no power either to control or to tax the banking institutions of the United States. But the converse does not obtain. *Veazie Bank v. Fenno*, 8 Wall. 533. The state judicial power does not extend to instrumentalities of the United States. *Knox Loan Association v. Phillips*, 300 U. S. 194, 202-203. But the federal bankruptcy power overrides conflicting state laws. *Van Huffel v. Harkelrode*, 284 U. S. 225, 228; *New York v. Irving Trust Co.*, 288 U. S. 329, 333; compare *United States v. Bekins*, 304 U. S. 273.


More directly in point are the many decisions of this Court which flatly contradict petitioners' assumption that mutual independence means a precisely equivalent scope to the federal and state taxing powers.

In both the first and the latest of its tax immunity cases the Court has expressly recognized the different basis, and the contrast in dangers of

abuse, between the federal and the state taxing power. In *McCulloch v. Maryland*, 4 Wheat. 316, Chief Justice Marshall unequivocally rejected the contention that the taxing powers were on a precise parity. He said (pp. 435-436):

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part

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on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

The Court in *Helvering v. Gerhardt*, 304 U. S. 405, 412–413, quoted this extract from *McCulloch v. Maryland*, and, in the light of 120 years of constitutional history, reaffirmed and amplified the reasoning of Chief Justice Marshall.²⁴ It said (p. 412):

In sustaining the immunity from state taxation, the opinion of the Court, by Chief Justice Marshall, recognized a clear distinction between the extent of the power of a state to tax national banks and that of the national government to tax state instrumentalities. He was careful to point out not only that the taxing power of the national government is supreme, by reason of the constitutional grant, but that in laying a federal tax on state instrumentalities the people of the states, acting through their representatives, are laying a tax on 'their own institutions and consequently are subject to political restraints which can be counted on to prevent abuse. State taxation of national

²⁴ In a sense the discussion was dictum, for the Court said (p. 415):

"We need not stop to inquire how far, as indicated in *McCulloch v. Maryland*, *supra*, the immunity of federal instrumentalities from state taxation rests on a different basis from that of state instrumentalities; or whether or to what degree it is more extensive. As to those questions, other considerations may be controlling which are not pertinent here. * * *

instrumentalities is subject to no such restraint, for the people outside the state have no representatives who participate in the legislation; and in a real sense, as to them, the taxation is without representation. The exercise of the national taxing power is thus subject to a safeguard which does not operate when a state undertakes to tax a national instrumentality.

Again, at a later point, this thought was repeated.²⁵ Finally the Court suggested that, in the case of a federal as opposed to a state instrumentality, the intention of the legislature may be controlling, for Congress might "curtail an immunity which might otherwise be implied * * * or enlarge it beyond the point where, Congress being silent, the Court would set its limits" (pp. 412-413).

The practical effect of the varying constitution of the national and state legislatures is well evidenced, as this Court noted in *Helvering v. Gerhardt*, *supra*, 417, in the fact that Congress has frequently waived the immunity relating to federal

²⁵ The Court said (p. 416): "the people of all the states have created the national government and are represented in Congress. Through that representation they exercise the national taxing power. The very fact that when they are exercising it they are taxing themselves, serves to guard against its abuse through the possibility of resort to the usual processes of political action which provides a readier and more adaptable means than any which courts can afford, for securing accommodation of the competing demands for national revenue, on the one hand, and for reasonable scope for the independence of state action, on the other."

activities;^{25a} we know of no comparable waiver by a state.

The opinions in the *McCulloch* and *Gerhardt* cases find ample support in the immunity cases which fill the books between 12 Wheaton and 304 United States. We have shown that the doctrine which denies tax immunity to proprietary or nonessential functions is inapplicable to federal instrumentalities (*supra*, pp. 18-26). A succeeding point develops the indisputable fact that every immunity case which was decided prior to *Collector v. Day*, in 1870, was based solely upon the supremacy clause of Article VI, and that none contained any hint of a reciprocal immunity (*infra*, pp. 52-54). Story entertained no doubt but that Congress could tax state instrumentalities although the states could not tax federal instrumentalities, *Constitution*, I, Sec. 1053.

Even since *Collector v. Day* was decided, numerous cases have recognized that the doctrine of immunity is grounded at least in part on the supremacy clause.²⁶ Equally significant is the fact that

^{25a} A number of such waivers are collected in the Brief for Respondent in *State Tax Commission v. Van Cott*, No. 491, this Term (p. 52-53).

²⁶ *Missouri v. Gehner*, 281 U. S. 313, 321; *Panhandle Oil Co. v. Knox*, 277 U. S. 218, 221; *Long v. Rockwood*, 277 U. S. 142, 147; *Jaybird Mining Co. v. Weir*, 271 U. S. 609, 613; *D & Moines Bank v. Fairweather*, 263 U. S. 103, 117; *Farmers Bank v. Minnesota*, 232 U. S. 516, 521; *South Carolina v. United States*, 199 U. S. 437, 451-452; *California v. Pacific Railroad Co.*, 127 U. S. 1, 41.

many other cases have expressly recognized the power of Congress to create a tax immunity which would not be implied in its silence and have held the taxpayer liable because Congress had provided no immunity.²⁷ Still other cases have extended tax immunity, in part at least, in obedience to the Congressional provision.²⁸ None has ever suggested that these doctrines were applicable to state instrumentalities or to persons dealing with states.

The doctrine of tax immunity is, indeed, equally applicable to both the states and the nation, so far as it protects the independence of each within their respective spheres. But to argue that this means a precise equivalence in the scope of the taxing powers is to ignore the words of the Constitution, making the federal laws supreme, to disregard the basic differences between the representation in the national as compared to the local legislatures, and to avoid the teaching of numerous decisions of this Court. Petitioners' simple syllogism is that the tax liability of proprietary or nonessential activi-

²⁷ *James v. Dravo Contracting Co.*, 302 U. S. 134, 161; *Federal Compress Co. v. McLean*, 291 U. S. 17, 23; *Trotter v. Tennessee*, 290 U. S. 354; *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127, 129; *Shaw v. Oil Corporation*, 276 U. S. 575, 578-579; *Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319, 323; *Goudy v. Meath*, 203 U. S. 146, 149-150; *Central Pacific Railroad v. California*, 162 U. S. 91, 121, 125; *Thomson v. Pacific Railroad*, 9 Wall. 579, 589, 592. See *infra*, pp. 126-131.

²⁸ *Lawrence v. Shaw*, 300 U. S. 245; *Federal Land Bank v. Crosland*, 261 U. S. 374; *Smith v. Kansas City Title Co.*, 255 U. S. 180, 212-213; see Justices Brandeis and Stone, concurring, *Miller v. Milwaukee*, 272 U. S. 713, 716.

ties of the states means a similar liability on the part of more or less comparable federal functions. It cannot be accepted by this Court without introducing a revolutionary concept into the doctrine of tax immunity and a catastrophic innovation into the constitutional history of the nation.

E. THE CORPORATE FORM OF THE HOME OWNERS' LOAN CORPORATION IS IMMATERIAL TO ITS STATUS AS A BRANCH OF THE UNITED STATES GOVERNMENT

Petitioners do not seem to argue that the status of the Home Owners' Loan Corporation is altered by the fact that it is a separate corporation (though see Br. 18). It is plain that no such proposition could be maintained.

The Home Owners' Loan Corporation was created by the Federal Home Loan Bank Board pursuant to Section 4 of the Home Owners' Loan Act of 1933.²⁹ It is declared to be an instrumentality of the United States. (Subd. (a).) Its entire capital stock was subscribed by the Secretary of the Treasury. (Subd. (b).) Its bonds are guaranteed as to principal and interest by the United States. (Subd. (c).) For a period of three years it could exchange its bonds for mortgages on urban homes, the mortgages to be amortized within a period of 15 years and to bear in-

²⁹ C. 64, 48 Stat. 128, as amended, Act of April 27, 1934, c. 168, 48 Stat. 643; Act of June 27, 1934, Secs. 402, 506, c. 847, 48 Stat. 1246; Act of May 28, 1935, Secs. 11, 17, c. 150, 49 Stat. 293.

terest not to exceed 5 per cent. (Subd. (d).) It could also make cash loans secured by a first mortgage. (Subd. (e).) Any surplus after liquidation of the Corporation is to be paid into the Treasury. (Subd. (k).) The Federal Reserve Banks may purchase Corporation bonds, rediscount notes secured by these bonds, and serve as fiscal agents of the Corporation.³⁰ The Corporation is authorized to purchase Federal Home Loan Bank bonds³¹ and shares of federal savings and loan association,³² and was directed to subscribe to the entire capital stock (\$100,000,000) of the Federal Savings and Loan Insurance Corporation.³³

The activities of the H. O. L. C. are plainly those of the United States, and "this is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account". *Clallam County v. United States*, 263 U. S. 341, 345. It is settled beyond question that the functions of the United States which are carried on through corporations have, unless waived by Congress, expressly or by implication, every constitutional immunity which attaches to those directly undertaken by the ordinary departments of the Government. See *McCulloch v. Maryland*, 4 Wheat, 316, 421-422; *Smith v. Kansas City*

³⁰ Sec. 4 of Act of April 27, 1934, *supra*, note 29.

³¹ Sec. 9 of Act of April 27, 1934; Sec. 17 of Act of May 28, 1935, *supra*, note 29.

³² Sec. 17 of Act of May 28, 1935, *supra*, note 29.

³³ Sec. 402 (b) of Act of June 27, 1934, *supra*, note 29.

Title Co., 255 U. S. 180, 208; *Federal Land Bank v. Crosland*, 261 U. S. 374; *New York ex rel. Rogers v. Graves*, 299 U. S. 401, 408.

This argument is developed in considerable detail, with respect to the Reconstruction Finance Corporation and Regional Agricultural Credit Corporation in *State Tax Commission v. Van Cott*, No. 491, this Term (pp. 25-40). Except for differences of detail, we think it equally applicable here and accordingly refer the Court to that brief if a more elaborate discussion be desired.

F. THE CONSTITUTIONALITY OF THE HOME OWNERS' LOAN CORPORATION IS NOT UNDER QUESTION HERE

So long, then, as the Home Owners' Loan Corporation is a constitutional exercise of the powers delegated to Congress, there can be no thought that its activities are proprietary or nonessential.

Petitioners do not challenge the constitutionality of the Home Owners' Loan Corporation.⁴⁴ Nor, in view of the recognition of its validity by the New York legislature,⁴⁵ would they have authority

⁴⁴ This question was raised or suggested in the specification of errors of their petition (p. 10) although it was not discussed in the accompanying brief. This specification of error has been abandoned in the brief on the merits (p. 5).

⁴⁵ L. 1934, c. 115, amending Sec. 278 of c. 50 of the Consolidated Laws provided that trustees, executors, administrators, banks, insurance companies, conservators, liquidators, and domestic corporations might at any time without order of court or other authority exchange mortgages for H. O. L. C. bonds, to be held "as authorized and lawful investments for any and all purposes."

to do so. And, apart from their absence of authority, they show no injury sufficient to give them standing to challenge the validity of the Home Owners' Loan Corporation.³⁶

Since the constitutionality of the H. O. L. C. has not and cannot be challenged in this proceeding, it follows that it must be taken to function in exercise of the powers granted to Congress³⁷ and cannot be said to be proprietary or nonessential in their nature.

III

THE GOVERNMENT OFFICER OR EMPLOYEE HAS NO CONSTITUTIONAL IMMUNITY AGAINST THE INCLUSION OF HIS SALARY IN THE BASIS OF A NET INCOME TAX

We have shown that the Home Owners' Loan Corporation is a branch of the United States Government, and that its operations have the same constitutional protection against state action that those of any of the regular departments have. The question, then, is whether an employee of the United States is exempt from a state income tax imposed on his salary.

³⁶ The loss in tax revenues, due to any immunity of the relator, would not arise from the operations of the H. O. L. C. but from the supposed attributes attaching to one employed by the United States. *Kay v. United States*, 303 U. S. 1, 6-7, 8, seems to settle that, constitutional or not, the H. O. L. C. is a part of the Government.

³⁷ As set out at length in the brief for the respondent in *Kay v. United States*, No. 61, October Term, 1937, pp. 64-102, the H. O. L. C. activities are an exercise of the fiscal and general welfare powers granted to Congress.

Whether there is such an exemption may, in one view, be largely a question of Congressional intention. See *Helvering v. Gerhardt*, 304 U. S. 405, 411-412. There is undoubted power in Congress to waive any immunity which could otherwise be claimed by an officer or employee of the United States.³⁸ Congress also has power to extend immunity to those who deal with the United States or its instrumentalities in cases where they would otherwise be taxable (*supra*, p. 35).

But here Congress has not acted either to exempt the officers and employees of the United States from state taxation or to make them liable. In the silence of Congress, the question reduces itself to the force of the Constitution alone.³⁹ We submit that the implications of the Constitution do not carry to the point that the salary paid by the United States to its officers and employees is ex-

³⁸ *Van Allen v. The Assessors*, 3 Wall. 573, 583, 585; *People v. Weaver*, 100 U. S. 539, 543; *Mercantile Bank v. New York*, 121 U. S. 138, 154; *Owensboro National Bank v. Owensboro*, 173 U. S. 664, 668; *Baltimore National Bank v. State Tax Commission*, 297 U. S. 209; *Oklahoma v. Barnsdall Corp.*, 296 U. S. 521, 525-526; *British-American Co. v. Board*, 299 U. S. 159; *Helvering v. Gerhardt*, *supra*, 417; cf. *United States v. Bekins*, 304 U. S. 27, 52.

³⁹ A later section discusses whether the silence of Congress can be construed to mean either an intention that the officer or employee should be exempt or an intention that he should be taxable (*infra*, pp. 121-134). Since this speculation as to the interpretation of Congressional silence requires a prior decision as to the force of the Constitution alone, the discussion must necessarily be postponed.

empt from a nondiscriminatory state tax upon the net income received by its citizens. We shall set out at length the reasons which we think compel this conclusion.

A. THE CASES WHICH INDICATE THAT THE OFFICER OR EMPLOYEE IS EXEMPT

In four cases the Court has held that a government officer is exempt from income taxation on his salary. No decision of this Court has held an employee of either the federal or the state governments to be exempt from income taxation on his salary. In its latest decision in this field the Court seems to have been careful to point out that the taxpayers were employees rather than officers. *Helvering v. Gerhardt*, 304 U. S. 405, 410, 415, 424. While we can see no reason why there should be a difference in result between officers and employees (see *infra*, pp. 64-65), it may be that the Court will feel the two cases not to be on the same footing. If this view were adopted, our argument would be contradicted by no decision of the Court, as the relator is plainly an employee rather than an officer of the Home Owners' Loan Corporation.

Since, however, we are unable to find any satisfactory grounds upon which to distinguish the tax liability of the employee and the officer, we shall proceed upon the assumption that the four cases dealing with officers are equally applicable to employees. Three of these afford no obstacle to our

position here; the fourth cannot satisfactorily be distinguished.

Dobbins v. Commissioners of Erie County, 16 Pet. 435, held a state tax invalid as applied to a federal officer. The statute directed the assessors "to rate all offices and posts of profit, professions, trades, and occupations, at their discretion, having a due regard to the profits arising therefrom" (p. 445). The tax was not strictly an income tax, although this factor was supposed to enter into the discretion of the assessors; the statute was in truth a tax upon an office, to be roughly measured by income.⁴⁰ While the practical effect might be much the same as an income tax, and while the Court viewed the emoluments rather than the office as taxable, the fact remains that the tax was in terms directed at a plainly exempt subject, an office of the United States. See *Helvering v. Gerhardt*, 303 U. S. 405, 413. The statute, moreover, had a flavor, at least, of discrimination, in that the income from rents and investments was not taxed.

Two later decisions may briefly be disposed of. In *New York ex rel. Rogers v. Graves*, 299 U. S. 401, the Court held that a state could not constitutionally tax the salary paid an officer of the Panama Railroad Company. None of the parties questioned the immunity of an officer of the United States, and the only question considered was

⁴⁰ The statute (Laws 1833-1834, Act No. 232, Sec. 4), included the offices under the head of "the following real and personal property."

whether the officer of this Government-owned corporation was entitled to the immunity supposed to attach to an officer of the United States. Much the same comment applies to *Brush v. Commissioner*, 300 U. S. 352, where the Court held the salary of a New York City water engineer exempt from the Federal income tax. That decision, in addition, has since been confined to a holding under a Treasury Regulation which is no longer in force. *Helvering v. Gerhardt*, 304 U. S. 405, 422-423.

However, in *Collector v. Day*, 11 Wall. 113, decided in 1870, the Court held a nondiscriminatory federal tax on net income to be invalid as applied to the salary of a state judge. That decision is contrary to our position here, since it would follow *a fortiori* that a state tax which included a federal salary would be invalid. *Collector v. Day* has six times been cited by this Court for the proposition that the compensation of a government officer or employee is immune from an income tax imposed by the other government.⁴¹ But, other than the

⁴¹ *Van Brocklin v. Tennessee*, 117 U. S. 151, 177-178; *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 484; *South Carolina v. United States*, 199 U. S. 437, 453; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 158; *Evans v. Gore*, 253 U. S. 245, 255; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 521. The decision was recognized but not necessarily approved in *Helvering v. Gerhardt*, 304 U. S. 405, 414-415, 417, 424.

The decision has been cited for more general propositions in eleven cases. *Plummer v. Coler*, 178 U. S. 115, 118; *Ambrosini v. United States*, 187 U. S. 1, 7; *Willcuts v. Bunn*,

two cases discussed above, it has been followed in no other decision of this Court.⁴² See *Helvering v. Gerhardt*, 304 U. S. 405, 422.

Our argument accordingly will be directed to *Collector v. Day*. We respectfully submit that this decision: (1) was an unwarranted extension of the doctrine established in *McCulloch v. Maryland*, 4 Wheat. 316; (2) cannot be reconciled with the subsequent decisions of this Court; (3) is supported by no practical justification; (4) proceeded from premises which have since been rejected; (5) can be supported by no other reason which this Court has advanced for a decision of immunity; (6) is condemned by the reasons the Court has announced in denying unfounded claims for tax immunity; and (7) established a rule which has first been adopted and then found unworkable by other federated governments having closely comparable problems.

282 U. S. 216, 225; *Educational Films Corp. v. Ward*, 282 U. S. 379, 392; *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 575; *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 400; *Board of Trustees v. United States*, 289 U. S. 48, 59; *Trinityfarm Co. v. Grosjean*, 291 U. S. 466, 471; *Ohio v. Helvering*, 292 U. S. 360, 368; *Carter v. Carter Coal Co.*, 298 U. S. 238, 294; *Brush v. Commissioner*, 300 U. S. 352, 364.

⁴² *Collector v. Day* has, of course, been followed in a large number of decisions of the lower federal courts and of the state courts. In a field so voluminous and so shifting as the tax immunity of private persons who have business relations with a government, we feel that no useful purpose would be served by examination of the decisions of courts of inferior authority.

B. THE DECISION IN *COLLECTOR v. DAY*

Although *Collector v. Day* has been narrowly confined, it has never been overruled in the 69 years which have followed its decision. It seems well, therefore, that in asking its reconsideration we make our arguments on a broad front, even at the cost of digression from the particular case before the Court. For example, even though this case involves a state tax on a federal employee, the authority of *Collector v. Day* cannot properly be gauged unless it be noted that it made a sharp and unwarranted departure from the federal supremacy basis of the earlier decisions.

1. *The Constitutional Background.*—Since the Articles of Confederation did not provide a power of taxation for the central government, the problem as to the scope of the national taxing power did not arise. However, the records show that on at least one occasion the Continental Congress was faced by the problem of discriminatory state taxation of the compensation paid by the Congress to its officers.⁴⁴ New Jersey in 1779 imposed a specific tax of £1,000 to £10,000 (in the discretion of the assessors) upon the Quartermaster General and the two Assistant Quartermasters General in the Continental Army.⁴⁵

⁴⁴ The legislation and the proceedings in the Congress were called to our attention through the courtesy of Mr. Irving Brant.

⁴⁵ 14 Journ. Cont. Cong. 931; 15 *id.* 1198; see 10 *id.* 210.

The heated and frequent protests⁴⁴ of the taxpayers, thus singled out for a special tax, produced only suggestions that they place themselves on the mercy of New Jersey. Three reports of special committees,⁴⁵ favoring nondiscriminatory taxation but condemning this tax and recommending that New Jersey be requested to repeal it, seem not to have been acted on.⁴⁶

Thus, the problems of intergovernmental tax immunity were known to some at least of the framers of the Federal Constitution.⁴⁷ Yet, there was no provision for immunity of persons who deal with the Federal Government or with the States. Indeed, in Section 8 of Article I, the Constitution provided an unqualified power in Congress "to lay and collect Taxes," and in Article VI declared that the laws of the United States "shall be the supreme Law of the Land." Nothing in the debates in the Constitutional Convention or in the ratifying con-

⁴⁴ June 18, 1779, 14 Journ. Cont. Cong. 744; June 24, 1779, 14 *id.* 787; July 7, 1779, 14 *id.* 807; Oct. 20, 1779, 15 *id.* 1198.

⁴⁵ Report of June 28, 1779, 14 Journ. Cont. Cong. 779-780; Report of July 8, 1779, 14 *id.* 807-808; Report of August 6, 1779, 14 *id.* 930-933.

⁴⁶ A motion to refer to committee the last letter of Charles Petit, Assistant Quartermaster General, stating that he had been called upon to pay £1,000 tax, was defeated by a vote of 7 states to 4. 15 Journ. Cont. Cong. 1199.

⁴⁷ Three of the signers of the Constitution (John Langdon, Roger Sherman, and John Dickinson), as members of the Congress, also voted on the motion to refer the letter of Charles Petit (footnote 47, *supra*) to committee, less than eight years before. 15 Journ. Cont. Cong. 1199.

ventions gives support to any implied immunity from the operation of the federal taxing power. On the contrary, the debates in the ratifying conventions⁴⁹ are filled with statements (directed, of course, to other issues) that the power of Congress to tax was unlimited.⁵⁰

2. *Origin of the Doctrine: Discriminatory Taxation.*—Whatever the silence of the Constitution, the Court by 1819 found it necessary to create a doctrine of an implied intergovernmental tax immunity. This was done in *McCulloch v. Maryland*, 4 Wheat. 316. The doctrine was fashioned in order to protect an important federal policy from complete frustration at the hands of dissident states. The Bank of United States was established in 1816; within three years eight states had enacted laws designed to penalize the bank or to expel its branches from their territory.⁵¹ The Maryland legislation provided that, if any bank established a branch office in the State without state authority,

⁴⁹ The debates in the federal convention are silent.

⁵⁰ See (references being to volume and page of Elliot's Debates, 2d ed.) Bodman (II, 60), Sedgwick (II, 60), and Choate (II, 79) of Massachusetts; Elsworth (II, 191) of Connecticut; Madison (III, 260) and Nicholas (III, 244-245) of Virginia; Williams (II, 330) and Smith (II, 337) of New York; McKean (II, 535-536) of Pennsylvania; Spencer (IV, 75) and Goudy (IV, 93) of North Carolina. See, also, Hamilton, *Report on Manufactures* (Hamilton's Works, III, 192); Message of President Monroe (Richardson, *Messages and Papers of the Presidents*, II, 165); Story, *Constitution*, I, Secs. 933-936, 942.

⁵¹ Warren, *The Supreme Court*, I, 505-506.

it must issue notes only in specified denominations and only on stamped paper to be purchased at prescribed rates from the Treasurer of the Western Shore; alternatively, the branch office could gain exemption from these requirements by the payment in advance of \$15,000 a year. In an action against the cashier, the State recovered judgment in the state court for the statutory penalties.

A distinguished array of counsel presented the cause to this Court. Webster, appearing for the bank, argued that if this tax were sustained there would be no limit to the interference with federal operations by state taxation save the discretion of the states, and that the power to tax necessarily involves the power to destroy (p. 327). Pinkney emphasized that a tax on the issuance of notes was a tax on the life of the Bank (p. 399). He further stated, without contradiction, that the tax was directed exclusively at the Bank of the United States; there was no other branch office in Maryland and state banks were forbidden to establish branches (p. 392).

None of the counsel questioned Webster's emphatic insistence that the Bank could be destroyed if the state were empowered to enact any tax.²² All six of the counsel united in assuming that the one question for decision was whether or not the

²² See Attorney General Wirt (p. 361) and Pinkney (p. 391), appearing for the Bank; and Hopkinson (pp. 347-348), Jones (p. 371), and Attorney General Martin (p. 376), counsel for Maryland.

states had a power which might completely frustrate the activity of a federal agency within their respective borders.

The Court unanimously declared the tax to be invalid. The major premise of the decision, not unnaturally, was that assumed by all of the counsel in argument. Speaking of the Bank, Chief Justice Marshall said "that the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied" (p. 427). Again, he stated "that the power to tax involves the power to destroy" is a proposition "not to be denied" (p. 431). With this assumption as to the nature of the power of taxation, it was necessary only to look at the constitutional provision that the laws of the United States should be supreme (p. 426) in order to conclude that no instrumentality of the Federal Government could be taxed by any of the states."

Five years later, in *Osborn v. United States Bank*, 9 Wheat. 738, the Court again considered a tax designed to penalize the Bank of United States. Ohio, in 1819, had passed an act which recited that

"The extent to which the discriminatory nature of the Maryland tax may have affected the decision of the Court is indicated by its dictum as to the permissible types of taxation. Chief Justice Marshall said (pp. 436-437):

"This opinion * * * does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state."

the Bank was doing business contrary to a state law and accordingly imposed an annual tax of \$50,000 for each office maintained within the state; the legislature authorized the state officials to distrain upon the property of the Bank in order to collect the tax (p. 740). The decision in *McCulloch v. Maryland* was plain authority for the invalidity of the tax.

The next case which arose also presented a tax which contained elements of discrimination against the United States. The ordinance considered in *Weston v. City Council of Charleston*, 2 Pet. 449, imposed a tax of 25 cents on each \$100 of the balance of bonds, notes, and insurance stock, which paid a net interest over the indebtedness of the taxpayer on which he paid interest. The statute specified that there was to be included the six and seven per cent issues of United States stock, but excepted South Carolina stock and the stock of South Carolina banks and of the Bank of the United States. Counsel for Weston stressed (p. 452) that the statute was not imposed upon all public funds but upon specified stock of the United States; counsel for Charleston admitted (p. 460) that the tax might well prejudice this particular stock in the market. Chief Justice Marshall, writing for a divided Court, held that the rule of *McCulloch v. Maryland* was equally applicable to this case. The tax necessarily affected the terms of and the power to make the loan (p. 468); since the power to tax was unlimited, if it existed at all (pp.

465-466), it could not constitutionally operate upon the borrowing power of the Federal Government (p. 464).

The doctrine of intergovernmental tax immunity was thus set on its course by these three decisions. In each of them the Court was protecting a federal function from a discriminatory tax either designed to make impossible its performance or which to some extent singled out transactions of the Federal Government for contribution to the tax revenues of the State. With the results in these cases none can quarrel; plainly not only the Federal Government but those who deal with it must be protected against discriminatory taxation by the states.

However, it must be admitted that the decisions were not placed on the ground of discrimination. The constitutional doctrine of the day dealt in terms of black and white: either there was complete power or no power whatever. Counsel for Maryland in *McCulloch v. Maryland* agreed with counsel for the Bank that if there were a power to tax it could be exercised in any manner; they offered only confidence in the "discretion and forbearance" of the states as protection for federal functions.⁵⁴ Chief Justice Marshall, in declaring a complete absence of power, said (*McCulloch v. Maryland*, *supra*, 430):

We are not driven to the perplexing inquiry, so unfit for the judicial department,

⁵⁴ Jones, for Maryland, footnote 52; *supra*.

what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power.

Accordingly he rejected in forthright terms the suggestion of Justice Johnson, dissenting in *Weston v. City Council of Charleston*, that the tax should be sustained because "conceived in the spirit of fairness, with a view to revenue, and no masked attack upon the powers of the general government" (p. 472). The Chief Justice said (pp. 465-466) :

Can anything be more dangerous, or more injurious, than the admission of a principle, which authorizes every state and every corporation in the Union which possesses the right of taxation, to burden the exercise of this power, at their discretion? If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent, within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe.

Given this reasoning, it is not surprising that the Court reached the same result in the subsequent cases where the element of discrimination was absent.

3. *Federal Supremacy; 1819-1870.*—The Court in *McCulloch v. Maryland* placed its decision squarely on the "great principle" that "the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and

laws of the respective states, and cannot be controlled by them" (p. 426). The opinion never deviates from the simple proposition that the states cannot tax federal instrumentalities because the Constitution declares the federal law, under which the instrumentality is created, to be supreme over the laws of the states. Thus, Chief Justice Marshall said (pp. 427, 432, 433):

It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. * * *

* * * * *

The American people have declared their constitution and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states. * * * The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

The plain implication of this reasoning is that the state instrumentalities have no corresponding immunity against federal taxation. The Court, as we have shown (*supra*, pp. 31-32), accepted the implication.

For the next fifty years the Court followed the course so clearly marked out in *McCulloch v. Maryland*. Prior to the Civil War the Court in three other cases held state taxes on federal instrumentalities to be invalid. *Osborn v. United States Bank, supra*, held invalid an Ohio tax directed at the Bank of the United States; *Weston v. City Council of Charleston, supra*, struck down a tax on specified issues of United States securities; and *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, held a federal officer exempt from a state tax, roughly measured by income, on his office. Each decision was expressly placed on the ground of the constitutional supremacy of the Federal Government.⁵⁵

During and immediately after the Civil War the Court held invalid a number of state taxes on the capital or assets of corporations where no deduction was made for the United States securities held. The ground of these decisions, again, was the supremacy of the laws and instrumentalities of the United States over state taxing statutes.⁵⁶

4. *Collector v. Day*.—Prior to 1870 the doctrine of tax immunity rested upon unassailable grounds. The Federal Constitution, plainly enough, contemplated independence between the central and the local governments. That independence was incom-

⁵⁵ 9 Wheat. at 868; 2 Pet. 466-468; 16 Pet. at 447-450.

⁵⁶ *Bank of Commerce v. New York City*, 2 Black 620, 632-634; *Bank Tax Case*, 2 Wall. 200; *The Banks v. The Mayor*, 7 Wall. 16, 25; *Bank v. Supervisors*, 7 Wall. 26.

patible with any tax levy by the one government upon the other. Taxes are compulsory exactions from a subject and the power to tax the other government itself may well be said to be forbidden by necessary implication. The independence of the national and state governments was equally incompatible with discriminatory taxation by the one government of persons who dealt with the other. Once a power to discriminate were conceded, the agencies of both the national and the local governments would truly be forced to look only to the "discretion and forbearance"⁵⁷ of the other. To this extent an immunity from taxation may fairly be said to be implied from the general structure of the Constitution.

The immunity accorded federal officers and bondholders from nondiscriminatory state taxation upon the office or the bonds did not rest upon the implications of the Constitution. It was, instead, placed squarely on Article VI. The persons dealing with the United States were engaged in a transaction entered into in exercise of a federal function. Since this function was supreme over state laws, the transaction could no more be taxed, in the absence of Congressional consent,⁵⁸ than could the

⁵⁷ Jones, for Maryland, in *McCulloch v. Maryland*, *supra*, 371.

⁵⁸ Under many circumstances, of course, the silence of Congress is to be construed as a consent to the tax. In the first half of the 19th century, when men were not accustomed to viewing governmental powers in terms of degrees, the si-

United States itself. The economic burden of the tax, the immediacy of its impact on the federal treasury, or its nondiscriminatory nature, is each irrelevant to the fundamental lack of power of a state taxing statute to reach an activity declared by the Constitution itself to be supreme.

The doctrine of intergovernmental tax immunity as it stood in 1870 was, accordingly, built on sound foundations. Its principles were intelligible and, indeed, obviously true. Its rules were simple and capable of almost automatic application. But in that year this Court decided *Collector v. Day*, 11 Wall. 113.

Day was judge of the Court of Probate and Insolvency for the County of Barnstable, Massachusetts. He was assessed, under the Civil War income tax, upon his salary, paid out of the State Treasury.⁶⁶ The tax, in the amount of \$16.50 for 1866 and \$45 for 1867, was paid under protest. This Court held the collection illegal, Justice Bradley dissenting and Chief Justice Chase not sitting.

The majority opinion, by Justice Nelson, followed a simple syllogism: Its major premise was the observations in the earlier cases, that the power

lence of Congress most probably would mean prohibition. Today, when the spreading effect of any governmental act is more explicitly recognized, the silence of Congress would indicate a consent to taxation of private persons which did not interfere with the performance of governmental functions. See *infra*, pp. 121-134.

⁶⁶ No. 329, December Term, 1870, R. 5.

to tax involves the power to destroy and might wholly defeat the operations of government (pp. 122-124). The minor premise was that the state governments had the same independence from the national government that the latter had from the states (pp. 124-126). From this it followed that, just as a federal office had been held immune from state taxation in *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, so the salary of a state officer was immune from federal taxation.

Neither premise of the syllogism was sound, and each was contradicted by the prior decisions of this Court.

First, the power of federal taxation does not involve the power to destroy the state governments with whom the taxpayers might be connected. We need not develop, at this point, the proposition that no nondiscriminatory tax on a private person can threaten a destructive interference with the operations of government.⁶⁰ For it is plain that each of the preceding cases followed the understanding of Chief Justice Marshall that any danger latent in the power of a state to tax those who deal with the Federal Government consists in the fact that the tax is imposed by an external government, and is not laid upon the constituents of the legislators (*supra*, pp. 31-33).

⁶⁰ Such taxes had been held invalid, because of federal supremacy, when imposed by the states. See *supra*, p. 54.

So far as the second premise of the decision concerned, the states quite plainly cannot have the same independence from the exercise of federal powers that the national government has from the exercise of state powers. Article VI, by establishing the supremacy of laws of the United States, operates to produce this result in two ways: First, the federal tax is a law of the United States, and by the Constitution itself is made the supreme law of the land. Second, the immunity which had been established against state taxation was not a vague implication to be derived from a federated government but was riveted tightly to the supremacy clause. Every preceding opinion of the Court had placed the decision of immunity squarely and unequivocally upon federal supremacy (*supra*, pp. 52-54). Justice Nelson necessarily misapplied these decisions and recast the whole law of tax immunity when, by use of generalities as to mutual independence, he completely escaped the force of Article VI.

In addition to the affirmative argument, the opinion in *Collector v. Day* contains two rebuttal arguments. Each, so far as it meets the issue it professes to raise, is unsound.

Justice Nelson offered two escapes from the supremacy clause. The first (p. 126) simply begged the question by the statement that the two governments were upon an equality. The second (pp. 126-127) was more intricate, and rested on the proposition that there was no federal supremacy.

over the states with respect to "an original inherent power never parted with." So far as this has meaning, it is that the laws of the United States are not supreme when they conflict with the state laws or functions undertaken under the powers reserved to the states, and thus makes the Constitution stand for *state* supremacy.

Justice Nelson, finally, found *Veazie Bank v. Fenno*, 8 Wall. 533, strong support for the proposition that the power to tax involves the power to destroy, but no authority for federal supremacy in the field of the reserved rights of the states (pp. 127-128). The tax in the *Veazie Bank* case was highly discriminatory against state banks and might not have been sustained under the taxing power alone.* However this may be, the case was unmistakable authority for federal supremacy. As Justice Nelson himself points out in *Collector v. Day*, the power to authorize banks to issue notes "had been exercised by the States since the foundation of the government" (p. 128).

The dissenting opinion of Justice Bradley has, we submit, far the better of the case. He stayed close to the reasons for tax immunity which had been developed during the preceding half century, and said (pp. 128-129):

the general government has the same power of taxing the income of officers of the State

*1 The opinion, however, emphasizes the taxing power more than the currency power, which was advanced as the second ground of decision.

governments as it has of taxing that of its own officers. It is the common government of all alike; and every citizen is presumed to trust his own government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the State government. * * * The taxation by the State governments of the instruments employed by the general government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation. * * *

The remainder of the dissenting opinion (p. 129) forecast with distressing accuracy the experience of the coming years:

In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult of control. * * * How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as any one can be to any interference by the general government with the just powers of the State governments. But no concession of any of the just powers of the general government can easily be recalled. * * *

We submit, therefore, that *Collector v. Day* was based on a misunderstanding of the prior law of

tax immunity, that it was not an application of the earlier cases but a contradiction of their results and a reversal of their reasoning. This would perhaps not be a serious indictment if the result had been sound. But instead it stood in flat opposition to Article VI of the Constitution and inaugurated confusion and contradiction which, we believe, have not been equalled in any field of constitutional law.

The tax immunity decisions of this Court for the succeeding sixty years have, in general, been an effort to restrict the implications of *Collector v. Day* to reasonable bounds. The result has been litigation in immense volume, with each new case, so long as *Collector v. Day* stood unreversed, contributing as much to the uncertainty as to the clarification of the law. We think that the subsequent decisions of this Court cannot be reconciled with *Collector v. Day* and have expressly rejected both the reasons advanced in that opinion for the decision and any other reason which has elsewhere been advanced to support such a result. We feel justified, therefore, in asking that the law be clarified and that the doctrine of tax immunity expressly be placed upon the sound basis which it had prior to *Collector v. Day* and to which it has in fact been returned by the more recent decisions of this Court.

C. COLLECTOR v. DAY CANNOT BE RECONCILED WITH THE
SUBSEQUENT DECISIONS OF THIS COURT

Our position goes farther than the bare proposition that *Collector v. Day* was wrongly decided in

1870. The decision, in addition, seems to us to be irreconcilable with the subsequent decisions of this Court in indistinguishable or closely analogous fields.

1. *The State Employee.*—In *Helvering v. Gerhardt*, 304 U. S. 405, the Court seems finally to have decided that the employees, as contrasted with the officers, of state and local governments can claim no immunity upon federal taxation of their salaries. The taxpayers there were, respectively, a construction engineer and assistant general managers of the Port of New York Authority. The Court held their salaries taxable under the federal income tax laws. The opinion proceeded on a broad front. The federal, in contrast to the state, taxing power is supreme; moreover, there is little need for constitutional limitation, since Congress is subject to self-restraint, in that it taxes its own constituents (pp. 412, 416). By granting immunity “beyond the necessity of protecting the state, the burden of the immunity is thrown upon the national government with benefit only to a privileged class of taxpayers” (p. 416). While the state might possibly be affected by the tax,⁴² “the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without

⁴² “In a complex economic society tax burdens laid upon those who directly or indirectly have dealings with the states, tend, to some extent not capable of precise measurement, to be passed on economically and thus to burden the state government itself.”

affording any corresponding tangible protection to the state government" (p. 420). The taxpayers are citizens of the United States, and bound to contribute to its support (p. 420). Even if the states should have to raise their salaries, the tax "does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states" (p. 420). To insure its continued existence, "it is not ordinarily necessary to confer on the state to a competitive advantage over private persons" (p. 421)

The decision seems fully applicable to all employees of the states and their political subdivisions. While the taxpayers there were not, in the strictest sense, employed by the State itself, this did not seem to influence the decision. Indeed, the entire discussion in the opinion, apart from the introductory statement of facts, contains only one reference to the fact that the taxpayers were employed, not by a state but by the Port of New York Authority. This reference follows the distinction of *Brush v. Commissioner*, 300 U. S. 352, and its limitation, on the ground of the Treasury Regulation then in force (p. 423). The fact that the taxpayers were not, strictly, employees of the state was used merely to show that they would have been taxable even under the Regulations to which the *Brush* case was confined.⁶⁸ The affirmative reasoning of the Court is directed entirely to state employees generally.

⁶⁸ The Court said (p. 423): "If the regulation be deemed to embrace the employees of a state owned corporation such as the Port Authority, it was unauthorized by the

Every reason, it will be noted, which is advanced by the Court to refuse immunity to the employee seems equally applicable to the officer. Allowing immunity to either an officer or an employee "is at the expense of the sovereign power of the nation to tax" (p. 416). In either case the tax is "collected not from a state treasury but from individual taxpayers" (p. 418). The tax on the state officer, equally with one on the employee, presents a situation where "the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state" (p. 420). Whether officers or employees, "The taxpayers enjoy the benefits and protection of the laws of the United States" and "are under a duty to support its government" (p. 420). In either case, "Even though, to some unascertainable extent," the states lose "the advantage of paying less than the standard rate," the tax "does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states" (p. 420).

statute. But we think it plain that employees of the Port Authority are not employees of the state or a political subdivision of it within the meaning of the regulation as originally promulgated—an additional reason why the regulation, even before the 1938 amendment, was ineffectual to exempt the salaries here involved."

We can see no basis upon which to distinguish the taxability of the employee from that of the officer. Each performs his duties in the exercise of state functions. Each is necessary if the work of government is to go on. Each is paid out of the state treasury. The distinction between the officer and the employee, at the most, consists in the facts that the officer ordinarily fills a position created by statute, takes an oath of office, and has a title, while the employee will infrequently meet all of these requirements. But not one of these points of differentiation has relevance to the question of tax immunity. It is wholly immaterial whether the formula to describe an invalid tax is phrased in terms of economic burden on the state, interference with its employment contracts, or a tax imposed with respect to state payments. Each explanation of the immunity is as fully applicable to the employee as to the officer.

It cannot, of course, be said that the opinion of the Court in *Helvering v. Gerhardt* is as fully applicable to the federal officer or employee as it is to that of the state. The emphasis placed upon Article VI, upon the states' representation in Congress, and upon the restriction of immunity to activities essential to the preservation of the existence of the states, are inapplicable in the case of a federal officer or employee. But perhaps the major part of the opinion covers federal as well as state officers and employees. If exemption were granted, the

federal as well as the state employees would constitute a privileged class of taxpayers. The tax, in either case, has only a remote and speculative effect upon the public treasury. As the state employee enjoys the benefits of federal citizenship, so the federal employee enjoys those of state citizenship. It seems plain enough, therefore, that the opinion in *Helvering v. Gerhardt* is incompatible with any constitutional immunity from a net income tax, whether that of an officer or employee, and whether he serves the state or nation.

2. *Independent Contractors*.—In *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, the Court held that the United States could tax the net income of a partnership which arose from its services as consultant to states and municipalities in connection with water supply and sewage disposal systems. The opinion emphasized that the taxpayer was not a part of the governmental organization but an independent contractor (p. 524), that the tax was nondiscriminatory (p. 524), and that there was no reason to believe that the imposition of such a tax would occasion any substantial interference with the functions of the governments for which the taxpayer performed services (p. 525). This rule has since been followed without qualification. *General Construction Co. v. Fisher*, 295 U. S. 715; *Atkinson v. State Tax Commission*, 303 U. S. 20; cf. *Helvering v. Therrell*, 303 U. S. 218. And in *James v. Dravo Contracting Co.*, 302 U. S. 134, the scope of the contractor's immunity was still further nar-

rowed, so that the federal contractor was held liable to a state gross receipts tax.

There are, of course, differences between the contractor and the officer. Typically, the contractor will have other business than that done for the government, he will not be a part of the regular governmental organization, and his employment will be temporary only. But these differences are irrelevant to the claim of tax immunity. The work done for the government is no less an important governmental function because done by a contractor rather than an officer or employee. His compensation is, equally with the officers, paid from the public treasury.⁴⁴ The government fixes the terms of the contract with the contractor as fully as with the officer. In short, there is no distinction between the contractor and the officer which is relevant to the reasons for granting an immunity against taxation. See *Helvering v. Curren*, 90 F. (2d) 620 (C. C. A. 2d).

3. *Interstate Commerce and Export Cases*.—The protection of interstate and foreign commerce against burdensome taxation by the States⁴⁵ has

⁴⁴ Indeed, since the contractor ordinarily accepts employment on the basis of bids in a rather fluid market, any effect of the tax is much more apt to be felt by the treasury than in the case of salaries paid officers, whose alternatives are fewer and whose calculation are less precise (see *infra*, pp. 76-79).

⁴⁵ This protection rests on the implication drawn from the power expressly given Congress to regulate interstate commerce and would seem to rank at least as high as the implication drawn generally from the nature of a federated system.

generally been assumed to be wholly analogous to the protection offered government instrumentalities.⁶⁶ In *James v. Dravo Contracting Co.*, 320 U. S. 134, 158, the Court held that the immunity granted interstate commerce was stricter,⁶⁷ and upheld a gross-receipts tax on the government contractor, although such a tax would be invalid as applied to interstate commerce. From this it should follow, at the least, that if a tax will be upheld with respect to income derived in interstate commerce, then it will be upheld with respect to income derived from the government.

It is settled that a gross-receipts tax upon transactions in interstate commerce is invalid⁶⁸ unless it is such as to be incapable of substantial duplication by other states.⁶⁹ Yet the Court has sustained a tax on the net income realized from interstate commerce. The reasoning of the Court in *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 329, seems equally applicable to the tax on the government officer:

⁶⁶ Mr. Justice Roberts, dissenting in *James v. Dravo Contracting Co.*, 302 U. S. 134, 182, lists thirteen decisions where the principles have been applied interchangeably.

⁶⁷ Compare *Gillespie v. Oklahoma*, 257 U. S. 501, 505.

⁶⁸ *Fargo v. Michigan*, 121 U. S. 230; *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292; *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650; *Adams Manufacturing Co. v. Storen*, 304 U. S. 307; *Gwin, White & Prince, Inc. v. Henneford*, No. 75, October Term, 1938, decided January 3, 1939.

⁶⁹ *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250; *Coverdale v. Pipe Line Co.*, 303 U. S. 604, 612-613.

Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States.

The *Oak Creek* decision has consistently been followed.⁷⁰

A similar course has been taken with respect to the power of Congress to tax exports. Instead of the constitutional implication which is said to restrict federal taxes which affect state or local governments,⁷¹ this field is governed by an express prohibition.⁷² Yet it is settled that Congress may tax the net income realized in the business of exporting. The reasoning of the Court in *Peck & Co. v. Lowe*, 247 U. S. 165, 174-175, is illuminating:

⁷⁰ *Shaffer v. Carter*, 252 U. S. 37; *Atlantic Coast Line v. Daughton*, 262 U. S. 413.

⁷¹ See *Helvering v. Gerhardt*, *supra*, 416; *Willcuts v. Bunn*, 282 U. S. 216, 231.

⁷² "No Tax or Duty shall be laid on Articles exported from any State." Article I, Section 9.

It [Revenue Act of 1913] is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are "net income arising or accruing from all sources." There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. * * *

If the net income tax does not burden interstate commerce or exportation, because it is imposed not on the transaction but only on the taxpayer's entire net income after its receipt, it is difficult to see why the same tax may not be imposed with respect to net income derived from the salary paid a government officer.

4. *The Trend of Decision.*—When *Collector v. Day* was decided, every prior decision had been in favor of immunity rather than taxability. Once the Court overcame the hurdle presented by the federal supremacy basis of the prior decisions, a decision of immunity readily followed. But the succeeding years have brought a marked change in emphasis in the law of tax immunity. The Court has increasingly recognized that "in a complex economic society tax burdens laid upon those who directly or indirectly have dealings with the states, tend, to some extent not capable of precise measurement, to

be passed on economically" (*Helvering v. Gerhardt*, *supra*, 416-417). The mere fact that the government may to some extent be affected no longer serves to invalidate a nondiscriminatory tax laid upon a private person.

Thus, the one who exploits lands under lease from the government can claim no immunity. He is subject to property taxes on the machinery and equipment used in the operations. *Taber v. Indian Territory Co.*, 300 U. S. 1. He is subject to property taxes on the ore produced, at least if the portion representing the government royalty has been separated. *Indian Territory Oil Co. v. Board*, 288 U. S. 325; see *Forbes v. Gracey*, 94 U. S. 762; *cf. Jaybird Mining Co. v. Weir*, 271 U. S. 609. Once he was immune from taxation on the net income derived from the operations. *Gillespie v. Oklahoma*, 257 U. S. 501; *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393. But at the last Term this Court overruled these decisions, and the lessee is now fully subject to net income tax. *Helvering v. Mountain Producers Corp.*, 303 U. S. 376.

So, too, the officer is subject to a tax upon his property, even though it consist of the salary paid him and deposited in a bank. *Dyer v. City of Melrose*, 215 U. S. 594. Licensees of the government, too, are able to claim no immunity from property taxes. *Susquehanna Co. v. Tax Commission (No. 1)*, 283 U. S. 291. The licensee, at least when a patentee, was once held immune from taxation on

his income, *Long v. Rockwood*, 277 U. S. 142, but this decision was unanimously reversed after only four years of life. *Fox Film Corp. v. Doyal*, 286 U. S. 123. The state or federal government may tax the transfer by will of property to the other. *United States v. Perkins*, 163 U. S. 625; *Snyder v. Bettman*, 190 U. S. 249. The manufacture of goods may be taxed by the United States even though they are sold to the state after manufacture, *Liggett & Myers Co. v. United States*, 299 U. S. 383, as may the transportation of goods to the government purchaser, *Wheeler Lumber Co. v. United States*, 281 U. S. 572.

These cases, selected from diverse fields, illustrate the growing pragmatism in the tax immunity decisions of this Court.⁷³ We find them difficult, if not impossible, to reconcile with *Collector v. Day*, where the Court held a nondiscriminatory tax on the income of a state officer to be invalid without any inquiry whatever into the effect of such a tax, if any, upon the operations of the state.

D. THERE IS NO PRACTICAL JUSTIFICATION FOR THE IMMUNITY

If the immunity of the officer or employee from nondiscriminatory income taxation is to be measured by the pragmatic standards which have re-

⁷³ We do not wish to suggest that there are no unreversed decisions of this Court which hold a private person immune from nondiscriminatory taxation. This circumstance, however, does not destroy the clarity of the general trend which we have sketched above.

cently come to guide decision, we submit that it must be found to be baseless.

1. *The Propriety that the Officer or Employee Pay the Tax.*—The man who accepts a government office or employment does not lose his citizenship of the state or of the United States. He does not become isolated from the numberless benefits which the state and federal governments afford their citizens. Almost every advantage which each government secures for its people serves the officers and employees of the other as fully as the private citizen. As this Court said of the employees whose claim for immunity was considered in *Helvering v. Gerhardt*, 304 U. S. 405, 420, "The taxpayers enjoy the benefits and protection of the laws of the United States. They are under a duty to support its government * * *."

The purpose of taxation is to insure that persons benefited by government make a just contribution to its cost: "Taxes are what we pay for civilized society * * *." *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 313. And the chief advantage of the net income tax is that it insures a more equitable distribution of these costs than is likely to be the case with other taxes. *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 559-560; *Rapid Transit Corp. v. New York*, 303 U. S. 573, 582; see *Welch v. Henry*, No. 13, October Term, 1938 (p. 7), decided November 21, 1938. The guiding principle of net income taxation is that the cost of government

is thereby distributed according to the ability of each citizen to pay. The complete immunity which is offered the government officer, able to pay the tax and receiving the benefits of living under the other government, comes close to being a travesty on the principles of income taxation. It can be supported, in the silence of Congress, only if there be clear showing that the safety and independence of the federal or state government depend upon granting this privileged status to their officers.

2. *The Government is not Threatened by Taxation of Its Officer.*—The income tax upon the salary of a government officer or employee is a tax which is directed not at the government but at him alone. He pays excise taxes upon his transactions, and direct taxes on his property as a matter of course. There would seem to be no reason why an income tax alone should be held incapable of reaching him. The only practical reason which has ever been suggested is that it reduces the compensation paid him by the government and thus makes it more costly for it to obtain its officers. This speculation is, we submit, wholly unfounded.

a. In the first place it is by no means an invariable rule that the amount of the government salary will be reflected in the income tax paid. The net income tax is not laid upon each bit of income as it is received by the officer, but instead "the tax is laid upon the net results of a bundle or aggregate of occupations and investments. * * * The

returns from his occupations and investments are thrown into a pot, and after deducting payments for debts and expenses as well as other items, the amount of the net yield is the base on which his tax will be assessed." *Hale v. State Board*, 302 U. S. 95, 108. Until it is first ascertained that the officer does not have deductible losses, personal exemptions, charitable contributions, and the like, sufficient to offset the government salary, the question of a tax on the compensation paid by the government does not even arise. And when the tax base includes other income as well as numerous deductions, credits, and exemptions, only an arbitrary allocation will permit one to say what proportion of the tax is attributable to the salary paid by the state.

Perhaps an even more important consideration is that under a progressive income tax the exemption of the government salary operates in a variable and discriminatory fashion. The low salaried employee whose income does not exceed the personal exemptions and earned income credits derives no benefit whatever from the exemption. The officer or employee who has no independent income, but has salary large enough to be taxable receives a moderate bounty, the amount of the tax as applied to his salary. The officer or employee who has an independent income receives a much larger bounty, equivalent to that percentage of his salary

which is represented by the maximum surtax rates applicable to his income. If, for an extreme example, the office holder has an independent income so large as to reach into the surtax brackets of 50 percent, the tax exemption privilege amounts to one-half or more of his government salary.

From this, two conclusions may readily be drawn. It is, in the first place, most difficult to see that performance of the government functions requires that a privilege be extended its officers and employees which is so variable and so irrelevant to any rational ground for immunity as is this. In the second place, the extent of the privilege varies in precisely inverse correlation to its only possible justification. If the privilege of tax immunity in truth has any tendency to permit the government to obtain services at bargain rates, then it would operate upon those to whom the salary offered was a matter of nice calculation. But the very ones who profit most by the privilege are those with large independent incomes to whom the amount of the salary is unimportant.

b. But even in the case of the officer whose income tax can directly be traced to the compensation received from the government, and who has no independent income, it is most doubtful that his liability to tax would have any effect whatever upon the salary which the state must pay to obtain his services.

Such, indeed, is the teaching of the economists, who state (subject to qualifications not applicable

here) that the burden of a personal income tax cannot be shifted but must ordinarily be borne by the taxpayer alone.⁷⁴ It seems worth while to spell out the considerations which lead to this conclusion, even though they are so much matters of common knowledge that controversy over them would be difficult to imagine.

The employment contract is notorious among economists for the inexactitude with which its terms are formulated.⁷⁵ The amount of the wages or salary is only one of many factors weighed by the man who contemplates a given employment. Often it will be far outweighed by other considerations. The nature of the work, whether pleasant or tedious, and the comparative prestige value of the occupation will frequently be the predominant element of his choice. The proximity of the employment to a home, and the comparative presence or absence of congenial surroundings, may sometimes be controlling. Whether the employment may be expected to lead to more attractive positions and its security of tenure will as often as not outweigh the salary offered.

⁷⁴ Seligman, *Income Tax*, VII Encyclopedia of Social Sciences, 626-638; Plehn, *Public Finance* (5th Ed.), p. 320; Buehler, *Public Finance*, p. 240; Lutz, *Public Finance* (2d Ed.), p. 336.

⁷⁵ Dickinson, *Compensating Industrial Effort* (1937), pp. 7-8; Douglas, *The Reality of Non-Commercial Incentives in Industrial Life*, c. V. of *The Trend of Economics* (1924); Fetter, *Economic Principles* (1915), p. 203; Ely and others, *Outlines of Economics* (5th Ed., 1930), p. 431.

These considerations ensure that even in the business world the employment contract is not fixed by "the higgling and bargaining of the market place."⁷⁶ They are present in magnified form in the case of the public officer. His position will commonly have some degree of prestige. He may view it as a useful stepping stone, in or out of public office. The work will frequently have more interest for him than would alternative positions in private enterprise. Often, as in the case of civil service positions, there will be an assurance of tenure which would not elsewhere be duplicated.

It seems plain enough, therefore, that the fractional diminution in compensation which might be thought to be found in the income tax would rarely be a factor of appreciable weight in the decision of the man who considers taking public office. We venture the statement that, in looking over our common experience, none can recall a man who took public office or employment because of a supposed immunity from the income tax. In some, who weight their decisions with more precision than do most men, the factor may have lurked among the many reasons which shaped the choice. But even in these cases it would require a preternaturally careful analyst to say that, absent the immunity, the decision would have been otherwise.

Unless the choice of the typical man considering public office is shaped by the prospect of tax im-

⁷⁶ Adam Smith, *The Wealth of Nations*, I, 27.

munity it can have no effect whatever on the government. Only so far as the best available candidates and applicants would refuse to serve because the salary, otherwise adequate, is too low when income taxation also is considered, will the government be under any compulsion or even inducement to raise salaries. If the officer will serve for a salary of \$5,000, whether or not he must pay an income tax of \$100, the government can have no concern with his liability to the tax.

c. We think that it is clear enough that the liability of the officer to income taxation will rarely, if ever, force the government to pay him a greater salary than if he were exempt. But, certainly, none will dispute that the effect upon the government is wholly speculative. The results of extending immunity are thus, on the one hand, to confer a certain and inequitable absolution to the federal or state officer from his duty to contribute to the costs of government in order, on the other hand, to offer an advantage to the other government which it is very unlikely ever to receive. The case falls well within the principle of *Willcuts v. Bunn*, 282 U. S. 216, 225, quoted and applied in *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, 385, where the Court said the taxing power should not be crippled "where no direct burden is laid upon the governmental instrumentality and there is only remote, if any, influence upon the exercise of the functions of government." In *Helvering v. Gerhardt*, *supra*,

the opinion is even more explicit. Speaking of the taxpayers there, and necessarily with equal application to all federal and state employees and officers, the Court said (p. 421):

The effect of the immunity if allowed would be to relieve respondents of their duty of financial support to the national government, in order to secure to the state a theoretical advantage so speculative in its character and measurement as to be unsubstantial. A tax immunity devised for protection of the states as governmental entities cannot be pressed so far.

d. But even if the compensation paid the government officer were certain to be reflected in his income tax, even if this were to make him more reluctant to take office, and even if the absence of tax immunity were certain to affect the public treasury, we are by no means persuaded that exemption should therefore be granted. If this were in truth the case, the effect would be to grant to the one government a bounty from the other, equivalent to laying the tax and refunding the proceeds to the employing government.⁷⁷

As this Court has already said, in *Helvering v. Gerhardt*, *supra*, 421, "it is not ordinarily necessary to confer on the state a competitive advantage

⁷⁷ This procedure, it may be noted, would be much more efficient, and would produce much less inequitable dislocation of the tax system, than the present approach, which consists essentially of granting the exemption and hoping that some of its effects are felt by the employing government.

over private persons in carrying on the operations of its government" in order to protect "the continued existence of the state."

e. There remains only the fear, admittedly speculative, that the taxing government might impose an income tax so heavy that the other would be unable to fill its offices unless it could offer the additional bounty of tax immunity. But this fear is not only conjectural but is demonstrably unfounded.

No one doubts that a discriminatory tax would be forbidden by the implications of the Constitution. The question here relates only to a nondiscriminatory tax. It is inconceivable that either Congress or the states would impose a general income tax so high that persons would refuse to serve the state; by the same token it would be so high that they could no more profitably serve a private employer. Neither past history nor the direst prophecy of the future supposes that a representative legislature will tax the earned income of individuals at a prohibitive rate. If representation is not a sufficient protection against dangerous taxation, the whole theory of our government and national history must be recast.

E. THE REASONS ADVANCED FOR THE DECISION IN *COLLECTOR V. DAY* HAVE SUBSEQUENTLY BEEN REJECTED

The opinion in *Collector v. Day*, 11 Wall. 113, in addition to the argument that federal and state tax immunities were coextensive (discussed *supra*, pp.

26-36, 57-58), suggests three reasons why the implications of the Constitution forbade application of the income tax to the salary of a government officer. They are: (1) the power to tax involves the power to destroy (pp. 123, 124, 125, 127); (2) the tax represents an interference with the state function, in that case the administration of justice (pp. 122-123, 127); (3) the salary has the same immunity as its source, the office of judge (p. 123). Each of these reasons for holding a private person immune from a nondiscriminatory tax has been rejected in the subsequent decisions of this Court.

1. *The Power To Tax Is No Longer Thought To Involve the Power To Destroy.*—When *Collector v. Day* was decided the Court had several times repeated Marshall's great dictum that the power to tax involves the power to destroy.¹⁸ The subsequent decisions of the Court, notably during the first fifty years after the decision in *Collector v. Day*, have with some degree of consistency mentioned the premise that the tax upon the government instrumentality or on those who dealt with it involved the power to destroy it.¹⁹ But measured

¹⁸ *McCulloch v. Maryland*, 4 Wheat. 316, 427, 430, 431; *Weston v. City Council of Charleston*, 2 Pet. 449, 466; *Bank of Commerce v. New York City*, 2 Black 620; see also *Crandall v. Nevada*, 6 Wall. 35, 46.

¹⁹ This statement has appeared in ten cases, only four of them subsequent to 1916. *United States v. Railroad Co.*, 17 Wall. 322, 327; *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 155; *California v. Pacific Railroad*, 127 U. S. 1, 41; *Ambrosini v. United States*, 187 U. S. 1, 7; *Williams v. Tal-*

against the subsequent development of constitutional history, the power to tax demonstrably does not involve the power to destroy.

A majority of the Court has never expressly rejected this doctrine. However, Justice Holmes in two dissenting opinions has taken direct issue with Chief Justice Marshall.⁴⁰ *Long v. Rockwood*, 277 U. S. 142, 150; *Panhandle Oil Co. v. Knox*, 277 U. S. 218. In the latter case he said (p. 223):

In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. But this Court, which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits. The power to fix rates is the power to destroy if unlimited, but this Court while it endeavors to prevent confiscation does not prevent the fixing of rates.

Iadega, 226 U. S. 404, 419; *Indian Oil Co. v. Oklahoma*, 240 U. S. 522, 530; *Smith v. Kansas City Title Co.*, 255 U. S. 180, 212-213; *Gillespie v. Oklahoma*, 257 U. S. 501, 505; *Macallen Co. v. Massachusetts*, 279 U. S. 620, 624, 628; *Missouri v. Gehner*, 281 U. S. 313, 321. See the dictum in *Home Insurance Co. v. New York*, 134 U. S. 594, 598, and Justice White, dissenting in *Snyder v. Bettman*, 190 U. S. 249, 259.

⁴⁰ In one or both of these opinions he has been joined by Justices Brandeis, Sutherland, and Stone.

The proposition that the power to tax is the power to destroy appears to be contradicted by half a hundred decisions of the Court. In 33 cases it has sustained taxes on persons who dealt with the Government which, if pressed to discriminatory and oppressive limits, might destroy the governmental function as fully as would the tax considered in *McCulloch v. Maryland*.¹ And in

¹ Property tax on contractor: *Thomson v. Pacific Railroad*, 9 Wall. 579; *Railroad Co. v. Peniston*, 18 Wall. 5; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; *Central Pacific Railroad v. California*, 162 U. S. 91; *Baltimore Shipbuilding Co. v. Baltimore*, 195 U. S. 375; *Gromer v. Standard Dredging Co.*, 224 U. S. 362; *Choctaw O. & G. Railroad Co. v. Mackey*, 256 U. S. 531; property tax on employee: *Dyer v. City of Melrose*, 215 U. S. 594; property tax on lessee: *Thomas v. Gay*, 169 U. S. 264; *Wagoner v. Evans*, 170 U. S. 588; *Indian Territory Oil Co. v. Board*, 288 U. S. 325; *Taber v. Indian Territory Co.*, 300 U. S. 1; property tax on licensee: *Susquehanna Co. v. Tax Commission (No. 1)*, 283 U. S. 291; *Broad River Power Co. v. Query*, 288 U. S. 178; tax on sales or payments to contractor: *Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319; *Trinityfarm Co. v. Grosjean*, 291 U. S. 466; *Tirrell v. Johnston*, 293 U. S. 533; transportation tax, *Wheeler Lumber Co. v. United States*, 281 U. S. 572, or manufacturers' tax, *Liggett & Myers Co. v. United States*, 299 U. S. 383, on vendor; net income tax on contractor: *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *General Construction Co. v. Fisher*, 295 U. S. 715; *Atkinson v. State Tax Commission*, 303 U. S. 20; net income tax on employee, *Helvering v. Gerhardt*, 304 U. S. 405; net income tax on lessee: *Group No. 1 Oil Corp. v. Bass*, 283 U. S. 279; *Burnet v. A. T. Jergins Trust*, 288 U. S. 508; *Helvering v. Bankline Oil Co.*, 303 U. S. 362; *Helvering v. Mountain Producers Corp.*, 303 U. S. 376; net income tax on licensee: *Fox Film Corp. v. Doyal*, 286 U. S. 123; gross receipts tax on contractor: *Alward v. Johnson*, 282 U. S.

17 other cases the Court has sustained taxes which might, if carried to similarly discriminatory and oppressive limits, serve to destroy an important or substantial field for operation of the governmental power.⁸²

Moreover, the decisions of the Court have recognized that relatively simple distinction could be made between the power of taxation and that of destruction. In *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, the Court sustained a tax upon the capital stock of a corporation considered

509; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Mazon Co. v. Tax Commission*, 302 U. S. 186; license tax on licenses: *Federal Compress Co. v. McLean*, 291 U. S. 17; property tax on Treasury check: *Hibernia Savings Society v. San Francisco*, 200 U. S. 310.

⁸² Tax on shares of corporations holding government bonds: *Van Allen v. The Assessors*, 3 Wall. 573; *National Bank v. Commonwealth*, 9 Wall. 353; *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 113; tax on franchises of corporations holding government bonds or deposits: *Society for Savings v. Coite*, 6 Wall. 594; *Provident Institution v. Massachusetts*, 6 Wall. 611; *Hamilton Co. v. Massachusetts*, 6 Wall. 632; *Home Insurance Co. v. New York*, 134 U. S. 594; *Manhattan Co. v. Blake*, 148 U. S. 412; *Flint v. Stone Tracy Co.*, 220 U. S. 107; cf. *Educational Films Corp. v. Ward*, 282 U. S. 379; estate or inheritance tax on legacies to the government: *United States v. Perkins*, 163 U. S. 625; *Snyder v. Bettman*, 190 U. S. 249; estate or inheritance tax on transfer of government bonds: *Plummer v. Coler*, 178 U. S. 115; *Greiner v. Lewellyn*, 258 U. S. 384; *Blodgett v. Silberman*, 277 U. S. 1; tax on profit from sale of government bonds: *Willcuts v. Bunn*, 282 U. S. 216; tax unreduced by interest charges for carrying government bonds: *Denman v. Slayton*, 282 U. S. 514.

a be a governmental agency ; the tax was prorated according to miles of wire within the state, and the Court viewed it as one really on property. The Court, nonetheless, recognized that "the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there" (p. 548). The District Court had granted an injunction against the further prosecution of the company's business until the taxes had been paid. While sustaining the decision as to the taxes, the Court reversed the granting of the injunction. It said (p. 554) :

If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done. * * *

* * * we do not deprive the State of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment—executions, sequestration, and any other appropriate remedy in chancery.

In *New Brunswick v. United States*, 276 U. S. 547, the Court considered the power of the State to impose property taxes upon real property formerly owned by the United States and sold to private persons; the Government had retained the title to

secure the unpaid balance of the purchase price. Since the purchasers were the equitable owners of the property, the tax was sustained. The Court also held the tax could be assessed against the full value of the lots, and could be enforced by sale. It said (p. 556) that—

the City is without authority to enforce the collection of the taxes thus assessed against the purchasers by a sale of the interest in the lots which was retained and held by the [government] Corporation as security for the payment of the unpaid purchase money.

* * *

We conclude that, although the City should not be enjoined from collecting the taxes assessed to the purchasers by sales of their interests in the lots, as equitable owners, it should be enjoined from selling the lots for the collection of such taxes unless all rights, liens and interests in the lots, retained and held by the corporation as security for the unpaid purchase moneys, are expressly excluded from such sales, * * *.

A similar doctrine obtains in the analogous field of interstate commerce, where nondiscriminatory state taxation is permissible, although prohibition of the transaction would be beyond state power, *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 513-514.

2. *The Tax Can No Longer Be Considered an Interference with the Government Function.*—It is not wholly clear whether the opinion in *Collector v.*

Day assigns an interference with the administration of justice by the State as a separate reason for exemption, relating to the actual taxes in issue, or whether it advances this reason as an alternative phrasing of the conjectured results, in terms of future and destructive taxes, of sustaining the power to tax. But, assuming it was thought that general, nondiscriminatory taxes were such as to interfere with the administration of justice, it is submitted that such a view cannot at this time be accepted by the Court.

In the first place, the federal income tax had no relation to the judicial process. Except so far as the Court felt that Judge *Day* could not properly decide the issues of his probate court with a mind troubled by thoughts of preparing and paying his personal tax returns, it seems impossible that it could have been feared that his tax liability would actually interfere with his conduct of litigation. It seems rather more probable that Justice Nelson meant that the tax threatened an interference with the contract of employment, or the incidents of the office. So viewed, this suggestion in the opinion in *Collector v. Day* finds some support in several other cases, in which a tax upon a private person has been said to represent an interference with the contract made by the government with the taxpayer.⁸³

⁸³ A property tax deemed to be upon government bonds, *Bank of Commerce v. New York City*, 2 Black 620, 633-634; *The Banks v. The Mayor*, 7 Wall. 16, 23-24; *Farmers Bank*

It is very hard to tell what is meant by the statement that the tax interferes with the contract. It plainly does not forbid the taxpayer to enter into or to execute the contract. It plainly does not regulate the terms of the contract or its performance. Its only interference seems to be any practical discouragement which the cost of the tax might have upon the taxpayer, with the result that his services might cost the government more. But this factor, as is shown in the next section, does not serve to make the tax an unconstitutional interference with the contract. The tax does no more than to subject the income of the taxpayer to the normal tax burdens, without any reference whatever to the fact that it originated in a transaction with the government.

The fallacy of the suggestion that the income tax is an interference with the contract of the government is well illustrated in *Choteau v. Burnet*, 283 U. S. 691. There the taxpayer was an Indian possessed of a certificate of competence; he derived income from the oil and gas leases made by the Secretary of the Interior for the benefit of the tribe. The Court sustained a federal income tax upon this income, and said (p. 697):

v. *Minnesota*, 232 U. S. 516, 526; an income tax on government bonds, *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 586; a tax upon a government office, roughly measured by the salary paid, *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, 448, 449, 450; and a tax upon sales to the government, *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 579.

* * * But whatever may have been the liability of the fund to federal taxation while it remained in the hands of the government, it cannot properly be said that the share of it paid as royalties to the petitioner constituted in his hands an instrumentality of the government and was therefore beyond the scope of the tax.

This decision, indicating clearly the distinction between the income before its payment by the government and after its receipt by the taxpayer, was followed with respect to a state tax similarly imposed upon an Indian with a certificate of competence. *Leahy v. State Treasurer*, 297 U. S. 420.

The notion that a tax upon the receipts derived from the government is an interference with the transaction is contradicted by the established rules that the net income or the gross receipts of the government contractor may be taxed, *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *James v. Dravo Contracting Co.*, 302 U. S. 134; and that the net income of the lessee may be taxed, *Helvering v. Mountain Producers Corp.*, 303 U. S. 376. If the conceptual dogma that a tax imposed with respect to income realized from a government transaction is an interference with that transaction were good law, neither of these taxes could be sustained. It is significant that this reason for extending tax immunity has been advanced only once⁴⁴ since the decision in *Metcalf & Eddy v. Mitchell*.

⁴⁴ *Indian Motorcycle Co. v. United States*, 283 U. S. 570. 579.

3. *The Salary Cannot Now Be Said to Share the Immunity of its Source.*—The opinion in *Collector v. Day* finally suggested that since the state judicial office as such was beyond the reach of the federal taxing power, so, too, was the salary paid the state judge. In other words, the compensation in the hands of the state officer shared the immunity of its source. While no earlier case seems to have articulated such a theory, some five of the subsequent decisions of the Court have adopted a similar premise.⁸⁵

Since these decisions, however, the doctrine that to tax the income is equivalent to taxing the source has expressly been rejected by the Court. In *New*

⁸⁵ In *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601, 618, the Court held the interest on municipal bonds "could not be taxed because of want of power to tax the source." In *Gillespie v. Oklahoma*, 257 U. S. 501, 506, the Court said that "the same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases." In *Northwestern Insurance Co. v. Wisconsin*, 275 U. S. 136, it said (p. 140): "Certainly since *Gillespie v. Oklahoma*, 257 U. S. 501, 505, it has been the settled doctrine here that where the principal is absolutely immune, no valid tax can be laid upon income arising therefrom. To tax this would amount practically to laying a burden on the exempted principal."

In *Long v. Rockwood*, 277 U. S. 142, 147, the Court again implied that to tax the royalties derived from patents was the equivalent to taxing the patent itself. This thought was repeated in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 400-401: "Here the lease to the respondent was an instrumentality of the State * * *. To tax the income of the lessee arising therefrom would amount to an imposition upon the lease itself."

York ex rel. Cohn v. Graves, 300 U. S. 308, the Court upheld the New York income tax imposed upon its residents with respect to rents derived from real estate located in other States. After pointing out that the tax is a necessary payment for the privilege of living in organized society, it said (pp. 313, 314):

Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason income is not necessarily clothed with the tax immunity enjoyed by its source.

* * *

Neither analysis of the two types of taxes, nor consideration of the bases upon which the power to impose them rests, supports the contention that a tax on income is a tax on the land which produces it. The incidence of a tax on income differs from that of a tax on property.

Pollock v. Farmers' Loan & Trust Co. was distinguished as, and limited to, a decision that a tax upon net income was a direct tax requiring apportionment; "the Court did not rest its decision upon the ground that the tax was a tax on the land" (p. 315).⁸⁶ Similarly in *Guaranty Trust Co. v. Virginia*, 305 U. S. 19, the Court sustained a tax on

⁸⁶ The intergovernmental tax immunity cases were dismissed, apparently not with approval, but with the statement that in them "it was thought that the tax, whether on the instrumentality or on the income produced by it, would equally burden the operations of government" (p. 315).

the income of a trust of personal property situated in another state; whatever the situs of the trust, and even though the income was taxed there, it was received in Virginia and could also be taxed there.

That the Court has thoroughly rejected the doctrine that a tax on income is a tax on its source is further demonstrated by the decision in *Hale v. State Board*, 302 U. S. 95. There state legislation, declaring that its bonds shall not be taxed, was held not to be infringed by an income tax on the bond interest. The ruling in the *Cohn* case was reaffirmed (pp. 106-107) and the Court further explained the nature of the income tax (p. 108):

* * * the tax complained of by appellants is not laid upon the obligation to pay the principal or interest created by the bonds, at all events within the meaning of the contract of exemption. The tax is laid upon the net results of a bundle or aggregate of occupations and investments. Under a statute so conceived and framed a man may own a quantity of state and county bonds and pay no tax whatever. The returns from his occupation and investments are thrown into a pot, and after deducting payments for debts and expenses as well as other items, the amount of the net yield is the base on which his tax will be assessed.

See also, *Adams Mfg. Co. v. Storen*, 304 U. S. 307, 313-316.

In addition to an express disavowal of this ground for extending immunity, the Court has refused to apply the reasoning in a variety of comparable situations. The net income tax upon the government contractor is not held to be invalid as a tax upon the contract. *Metcalf & Eddy v. Mitchell*, 269 U. S. 514. Even a gross income tax upon the contractor, reaching every payment as it is made, is similarly held not to be an invalid tax upon the contract.* The net income tax upon the government lessee has been sustained without thought that the lessee itself was thereby subjected to taxation. *Helvering v. Mountain Producers Corp.*, 303 U. S. 376.

It is, therefore, not surprising that most of the decisions which have adopted this reasoning as a basis for extending immunity have been overruled or weakened in authority. *Gillespie v. Oklahoma* and *Burnet v. Coronado Oil & Gas Co.* were expressly overruled in *Helvering v. Mountain Producers Corp.*, 303 U. S. 376. *Long v. Rockwood* was expressly overruled in *Fox Film Corp. v. Doyal*, 286 U. S. 123. *Northwestern Insurance Co. v. Wisconsin* is weakened by the decision in *James v. Dravo Contracting Co.*, 302 U. S. 134.**

* *James v. Dravo Contracting Co.*, 302 U. S. 134. (Both the majority and the minority opinions agreed on this point. 302 U. S. at 149, 161.)

** The basis for the *Northwestern* decision was that a "license fee" imposed upon insurance companies is not a franchise tax but a tax upon its revenues since it was measured by gross rather than by net income.

We urge, therefore, not only that *Collector v. Day* is irreconcilable with the subsequent decisions of this Court, and not only that the rule of immunity there announced has no practical justification, but also that each of the reasons for the decision which were advanced or suggested in that opinion has been rejected in the later tax immunity decisions.

F. THE IMMUNITY OF THE GOVERNMENT OFFICER CAN BE SUPPORTED BY NO OTHER REASON

We have shown that each of the three reasons, advanced or suggested in *Collector v. Day*, 11 Wall. 113, as justification for the decision of immunity, has been rejected in the subsequent decisions of this Court.

1. The only other reason which the Court seems ever to have articulated as an explanation for a decision extending exemption from a nondiscriminatory tax to a private person is that the economic burden of the tax might be passed on to the government.⁹⁹ Oddly enough, this simple reason for invalidating taxes upon private persons who deal

⁹⁹ In this examination no note will be taken of the various formulae by which the Court expresses the conclusion it has reached. These statements, however useful as a formulation of the judgment, contribute nothing to its explanation. Examples are: the tax is a direct or merely an indirect burden on the government (*Panhandle Oil Co. v. Knox*, 277 U. S. 218, 222); a substantial or only a remote interference with the functions of government (*Railroad Co. v. Peniston*, 18 Wall. 5, 36); or a threat, or none, to the independence of the national or state governments (*Helvering v. Powers*, 293 U. S. 214, 225).

with the Government has been adopted in only three cases. In *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, 448, the Court advanced as one of two grounds for its decision that, if the income of the government officer were taxed, his compensation would perforce be increased by the government. In *Gillespie v. Oklahoma*, 257 U. S. 501, 506, the Court said that a tax upon the income of the government lessee was invalid because, "stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards." And Chief Justice Marshall in *Weston v. City Council of Charleston*, 2 Pet. 449, 468, gave some emphasis to the admission of counsel that the discriminatory tax involved in that case would affect the terms on which the government borrowed. But apart from these cases no opinion of the Court has placed its decision of immunity upon this ground.⁹⁰

⁹⁰ Indeed, in *Home Savings Bank v. Des Moines*, 205 U. S. 503, 519, Justice Moody, writing for the Court, said: "The question here is one of power and not of economics. If the State has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence."

Dissenting opinions have, however, occasionally referred to the uncertainty that the tax declared invalid by the majority would have resulted in increasing the costs or lowering the revenues of the Government. *Jaybird Mining Co. v. Weir*, 271 U. S. 609, 615, 618; *National Life Ins. Co. v. United States*, 277 U. S. 508, 528; *Macallen Co. v. Massachusetts*, 279 U. S. 620, 637; *Missouri v. Gehner*, 281 U. S. 313,

To whatever extent that this factor has influenced these or other decisions, it can no longer be accepted as a ground for extending tax immunity. In *James v. Dravo Contracting Co.*, 302 U. S. 134, 160, the Court expressly held, in response to the Government's concession that the gross receipts tax on its contractor would result in substantially increased costs to the Government:

But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax. * * * Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work. Taxes may validly be laid not only on the contractor's machinery but on the fuel used to operate it. * * * But a tax of that sort unquestionably increases the expense of the contractor in performing his service and may, if it enters into the contractor's estimate, increase the cost to the Government.

In *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, the Court, in sustaining a tax upon the net income of a government lessee, recognized that one of the two grounds of the decision in the *Gillespie* case was the fact that the government might be forced to accept lowered rentals for its wards, but nonetheless overruled that decision. Finally,

331; *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 581; *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 113, 127; *Graves v. Texas Co.*, 298 U. S. 393, 406.

the opinion in *Helvering v. Gerhardt*, 304 U. S. 405, repeatedly stresses the fact that any supposed increase in cost to the government is immaterial to the validity of the tax. It said (pp. 420-421):

Even though, to some unascertainable extent, the tax deprives the states of the advantage of paying less than the standard rate for the services which they engage, it does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states. At most it may be said to increase somewhat the cost of the state governments because, in an interdependent economic society, the taxation of income tends to raise * * * the price of labor and materials.

The opinion also lists (pp. 418-419) a dozen cases where "taxpayers have been held subject to federal income tax notwithstanding its possible economic burden on the state." Again, it is said (p. 422):

The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity. Such burdens are but normal incidents of the organization within the same territory of two governments, each possessed of the taxing power.

2. It seems clear enough, therefore, that the mere fact that the income tax might serve some-

what to increase the cost of employing officers by the government will not stand as a sufficient reason for which to declare it unconstitutional. But it should once more be emphasized (see *supra*, pp. 74-80) that the net income on the salary of the officer or employee will in no sense require the government to offer higher salaries in order to obtain its servants, and accordingly will have no discernible tendency to increase the costs of government.


G. THE REASONS FOR DENYING A CLAIM FOR IMMUNITY ARE FULLY APPLICABLE TO THE GOVERNMENT OFFICER

The final step in the estimate of the present authority of *Collector v. Day*, 11 Wall. 113, seems appropriately to be a summary examination of the reasoning on the basis of which the Court has denied tax immunity to private persons who deal with the government. It will be seen that, just as there remains no valid reason for extending the immunity, so virtually every reason which this Court has advanced for denying exemption is completely applicable to the government officer or employee.

1. *Absence of Discrimination*.—In 1862 the Court expressly rejected the argument that a nondiscriminatory state property tax might be applied to federal securities.⁹¹ For sixty-five years after that case the Court ignored the presence or the absence of a discriminatory element in the challenged tax. If the Court did not again expressly reject it as a

⁹¹ *Bank of Commerce v. New York City*, 2 Black 620.

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test of validity,"²² it also failed to rely upon the absence of discrimination in any decision sustaining a tax assailed as an interference with the government operations.

But, in *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, decided in 1926, the Court sustained the federal income tax as applied to one who performed services for states and municipalities under contract. The decision was placed partially on the ground that "The tax is imposed without discrimination upon income whether derived from services rendered to the state or services rendered to private individuals" (p. 524). Within the next two or three years, the absence of discrimination was relied upon by the dissenting justices in three cases.²³ And in the decisions since 1931, the Court has mentioned or stressed this factor in numerous decisions. In five opinions strong and recurrent emphasis has been placed on the nondiscriminatory nature of the tax.²⁴ In addition, some reliance has been placed upon this factor in eight other decisions.²⁵

²² Compare *Johnson v. Maryland*, 254 U. S. 51, 55.

²³ *Long v. Rockwood*, 277 U. S. 142, 149, 150; *National Life Insurance Co. v. United States*, 277 U. S. 508, 530; *Macallen Co. v. Massachusetts*, 279 U. S. 620, 638; see also the dissent in *Brush v. Commissioner*, 300 U. S. 352, 375, 378.

²⁴ *Willcuts v. Bunn*, 282 U. S. 216, 225, 226, 227, 229; *Taber v. Indian Territory Co.*, 300 U. S. 1, 3, 4, 5; *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, 384, 385, 386, 387; *Helvering v. Gerhardt*, 304 U. S. 405, 413, 420; *Pacific Co. v. Johnson*, 285 U. S. 480, 493, 494, 495, 496.

²⁵ *Derman v. Slayton*, 282 U. S. 514, 520; *Group No. 1 Oil Corp. v. Bass*, 283 U. S. 279, 282; *Educational Films Corp. v. Ward*, 282 U. S. 379, 392; *Fox Film Corp. v. Doyal*, 286

The importance of the element of discrimination rests not only on the fact that a discriminatory tax is designed, or necessarily serves, as a discouragement against entering into the transaction with the government. In addition, to grant exemption from a nondiscriminatory tax serves, so far as the benefit is passed on to the government, to give it an advantage over private persons. The protection of governmental functions hardly can require that a positive bonus be conferred. As the Court said in *Helvering v. Gerhardt*, 304 U. S. 405, 421:

The basis upon which constitutional tax immunity of a state has been supported is the protection which it affords to the continued existence of the state. To attain that end it is not ordinarily necessary to confer on the state a competitive advantage over private persons in carrying on the operations of its government. * * *

The increasing frequency with which the Court has emphasized the nondiscriminatory operation of the taxes indicates that it is a factor of considerable significance.

2. *Maintenance of tax sources*.—Perhaps the most frequently expressed reason for denying a claim of tax exemption is the necessity that the sources of tax revenues be maintained. In some sixteen cases, extending from 1867 through the last

U. S. 123, 131; *Indian Territory Oil Co. v. Board*, 288 U. S. 325, 327; *Burnet v. A. T. Jergins Trust*, 288 U. S. 508, 514; *Federal Compress Co. v. McLean*, 291 U. S. 11, 23; *Jam-s v. Dravo Contracting Co.*, 302 U. S. 134, 149, 157.

Term, the Court has stressed the importance that the doctrine of implied immunity against taxation be confined to limits sufficiently narrow to prevent the attrition of sources of governmental revenue.⁹⁶ The Court, for example, in *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, 384, 385, undertook the reexamination of *Gillespie v. Oklahoma*, 257 U. S. 501, "in the light of the expanding needs of State and Nation." This reexamination was introduced with reference to the "principle, buttressed by the most cogent considerations, that the power to tax should not be crippled." And in *Helvering v. Gerhardt*, 304 U. S. 405, 416, the Court said—

any allowance of a tax immunity for the protection of state sovereignty is at the expense of the sovereign power of the nation to tax. Enlargement of the one involves diminution of the other. When enlargement proceeds beyond the necessity of protecting the state, the burden of the immunity

⁹⁶ *Hamilton Co. v. Massachusetts*, 6 Wall. 632, 638-639; *Thomson v. Pacific Railroad*, 9 Wall. 579, 591-592; *Railroad Co. v. Peniston*, 18 Wall. 5, 30-31, 33; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 549; *South Carolina v. United States*, 199 U. S. 437, 455, 463; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 172; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 524; *Willcuts v. Bunn*, 282 U. S. 216, 225; *Group No. 1 Oil Corp. v. Bass*, 283 U. S. 279, 283; *Susquehanna Co. v. Tax Commission (No. 1)*, 283 U. S. 291, 294, 295; *Helvering v. Powers*, 293 U. S. 214, 225; *United States v. California*, 297 U. S. 175, 184; *James v. Dravo Contracting Co.*, 302 U. S. 134, 150; *Allen v. Regents*, 304 U. S. 439.

is thrown upon the national government with benefit only to a privileged class of taxpayers.

The necessity that the tax revenues of the states and the nation be maintained finds fitting illustration in the case of the government officers and employees. Numbering many hundreds of thousands, their exemption from the state and federal income taxes costs millions of dollars in annual revenue.⁹⁷ Added to this direct diminution of the tax revenues is the collateral expense of voluminous litigation as to the existence of a constitutional immunity. More intangible, but probably at least as disturbing, is the effect of so inequitable an exemption upon what might be called taxpayer morale. The man who fills out a tax return is not apt to be so scrupulous as might otherwise be the case if he considers that his neighbor, a government employee with a comparable income, is to pay no tax whatever.

3. *Payment for benefits received.*—Another reason which has on occasion been advanced to sus-

⁹⁷ The Treasury Department has estimated that 25 percent of the 2,600,000 officers and employees of state governments would be subject to the federal income-tax laws if their supposed immunity were removed, and that their total tax payments would increase the federal revenues by about \$16,000,000 per year. Statement of Hon. John W. Hanes, Hearings Before Special Senate Committee on Taxation of Government Securities and Salaries, Jan. 18, 1939, pp. 10-11. No estimate has been made of the increased state revenues which would result.

tain a challenged tax is that the person who chances to deal with the Government, equally with all other citizens, should make his just contribution to the expenses of the government which seeks to impose the tax. This ground of decision we have already discussed (*supra*, pp. 73-74). Plainly the government officer or employee enjoys the benefits of living under the other government equally with all other persons. Common fairness would seem to require that he contribute his share to its costs.

4. *Conjectural effect upon the Government.*—The Court has on numerous occasions sustained a challenged tax because, having a due regard to the fact that the test is the practical effect of the tax,⁹⁸ it was unable to conclude that its impact on the government with which the taxpayer dealt would be real and substantial.⁹⁹ Thus, in *Helvering v.*

⁹⁸ *Railroad Co. v. Peniston*, 18 Wall. 5, 30-31; *Plummer v. Coler*, 178 U. S. 115, 135-136, 138; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 523-524; *Educational Films Corp. v. Ward*, 282 U. S. 379, 392; *Susquehanna Co. v. Tax Commission (No. 1)*, 283 U. S. 291, 294; *Group No. 1 Oil Corp. v. Bass*, 283 U. S. 279, 282; *Burnet v. A. T. Jergins Trust*, 288 U. S. 508, 516; *Graves v. Texas Co.*, 298 U. S. 393, 401; *James v. Dravo Contracting Co.*, 302 U. S. 134, 152; *Helvering v. Gerhardt*, 304 U. S. 405, 420-421.

⁹⁹ *National Bank v. Commonwealth*, 9 Wall. 353, 362; *Railroad Co. v. Peniston*, 18 Wall. 5, 30-31, 36-37; *Home Insurance Co. v. New York*, 134 U. S. 594, 598; *Central Pacific Railroad v. California*, 162 U. S. 91, 126; *Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319, 323; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 524, 525; *Willcuts v. Bunn*, 282 U. S. 216, 226; *Fox Film Corp. v. Doyal*, 286 U. S. 123, 128; *Indian Territory Oil Co. v. Board*, 288 U. S. 325, 328; *Burnet v.*

Mountain Producers Corp., 303 U. S. 376, 386, the Court said that immunity from nondiscriminatory taxation "cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects."

We have already shown that the net income tax on the salary of the government officer or employee in all probability will have no effect whatever on the public treasury; it certainly will not be disputed that any possible effect of the tax is extremely conjectural (see *supra*, pp. 74-80).

5. *Taxpayer Seeking a Private Profit*.—This is the only ground of decision leading to a denial of tax immunity which is not as fully applicable to the government officer as to any private person claiming exemption. This reason for refusing exemption has been mentioned in a number of opinions, commonly in terms which emphasize that the taxpayer is not a part of the government but instead a private entrepreneur or investor.¹ The

A. T. Jergins Trust, 288 U. S. 508, 516; *Taber v. Indian Territory Co.*, 300 U. S. 1, 3; *Helvering v. Therrell*, 303 U. S. 218.

¹ *Baltimore Shipbuilding Co. v. Baltimore*, 195 U. S. 375, 382; *Clallam County v. United States*, 263 U. S. 341, 345; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 525; *Susquehanna Co. v. Tax Commission (No. 1)*, 283 U. S. 291, 294; *Fox Film Corp. v. Doyal*, 286 U. S. 123, 130; *Federal Compress Co. v. McLean*, 291 U. S. 17, 23; *Helvering v. Bankline Oil Co.*, 303 U. S. 362, 369; *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, 386. See, also, *Burnet v. A. T. Jergins Trust*, 288 U. S. 508, 514; *James v. Dravo Contracting Co.*, 302 U. S. 134, 157. See also *Helvering v. Gerhardt*, 304 U. S. 405, 423, 424.

government officer is, of course, a part of the government while performing his official duties; to that extent this ground for denying the exemption is inapplicable. But it is equally true that the income tax is not laid on the performance of his official duties, but on the salary after it has left the public treasury and has been devoted to his personal ends. See *Dyer v. City of Melrose*, 215 U. S. 594; *Choteau v. Burnet*, 283 U. S. 691.

Accordingly even this ground of decision has some application here. Every other reason for holding taxable the private person who has dealings with the government is fully applicable to the officer or employee. Every reason which would lead to his exemption from a nondiscriminatory tax has been rejected by this Court. There is no practical reason for extending the immunity. We respectfully submit, therefore, that the rule exempting the officer or employee from a nondiscriminatory net income tax on his salary should be abandoned.

H. FOREIGN FEDERATIONS WITH SIMILAR PROBLEMS HAVE FIRST ADOPTED AND THEN REJECTED THE RULE OF *COLLECTOR V. DAY*

The experience of two other federated systems, which have been forced to wrestle with the problems of taxation as between central and local governments deserves especial emphasis. In both Canada and Australia the law of intergovernmental tax immunity has started with a rigorous appli-

cation of the doctrine of *Collector v. Day*, 11 Wall. 113, and has subsequently made a sharp departure. The later developments have extended virtually to the point of a complete abolition of every exemption of a private person which is based on an implied immunity from a nondiscriminatory tax. The course of decision in each of these jurisdictions will briefly be summarized.

1. *Canada*

The Canadian federation is governed by the British North America Act, 1867, 30 & 31 Vict., c. 3. In broad outline, the constitutional basis for the rules of intergovernmental tax immunity is similar to that of the United States. Section 125 expressly provides that "No Lands or Property belonging to *Canada* or any Province shall be liable to Taxation," but there is no provision relating to the immunity of private persons who deal with the Dominion or the provincial governments. Legislative power is distributed between the Dominion and provincial governments in a manner analogous to that obtaining in the United States (Secs. 91, 92), except that the central government is given the limited residuary power "to make Laws for the Peace, Order, and good Government of *Canada*, in relation to all Matters not * * * assigned exclusively to the Legislatures of the Provinces."²

² The Privy Council has confined the residuary clause to cases of extraordinary emergency or peril. See *Hodge v.* —

There is no express provision, but the supremacy of dominion laws is settled doctrine.³

a. *Early Immunity*.—The provincial courts, in which the questions of intergovernmental tax immunity first arose, unhesitatingly followed the American cases.

The leading case in accepting³ this rule was *Leprohon v. City of Ottawa*, 2 Ont. App. 522 (1878), holding the municipal income tax, authorized by provincial legislation, *ultra vires* when applied to the salary received by a member of the Dominion Parliament. This result was placed partly on the grounds that otherwise "the salary fixed by the proper authority of the Dominion Government would be subject to reduction by Provincial authority" (p. 526), and that the tax would impair the efficiency of the federal servants who would, *pro tanto*, be underpaid (p. 528). But each

The Queen, 9 App. Cas. 117 (1883); *Attorney General for the Dominion v. Attorney General for Alberta*, (1916) 1 A. C. 588; *In re Board of Commerce Act*, (1922) 1 A. C. 191; *Toronto Electric Commissioners v. Snider*, (1925) A. C. 396. Compare *Russell v. The Queen*, 7 App. Cas. 829 (1882).

³ Section 91, giving powers to the dominion, declares the legislative authority of the Parliament to be exclusive "notwithstanding anything in this Act," and further declares that any matter coming within any of the enumerated classes shall not be deemed to come within those matters assigned exclusively to the provincial legislatures. See *Tennant v. Union Bank of Canada*, (1894) A. C. 31; *Attorney General for Canada v. Attorneys General for the Provinces*, (1898) A. C. 700.

of the opinions makes plain that the American cases were the decisive factor.⁴

Subsequently, dominion officials were held exempt from provincial income taxation,⁵ from provincial poll taxes,⁶ and from garnishee or other actions of creditors.⁷

b. *Abandonment of Collector v. Day*.—But in the meantime, the Privy Council had given clear indication that it would not encourage the transplanting of the American doctrine. *Bank of Toronto v. Lambe*, 12 App. Cas. 575, was decided in 1887. There the bank, taken to be incorporated by the Dominion under the express authorization of

⁴ Spragge, C., expressed "high appreciation" of the "great merits and value" of the American cases, and said that their "principle is, if anything, more free from difficulty in its application to our constitution, than to that of the United States" (pp. 529, 530). Hagarty, C. J., could see "no practical difference in the principles governing" the tax immunity problems in each jurisdiction (pp. 532-533). Burton, J., devoted the bulk of his opinion to summarizing the "long course of well considered decisions" (p. 541) of this Court. Patterson, J., based his decision "upon the authority of the eminent American jurists which has settled the question in the neighbouring republic" (p. 567).

⁵ *Ex parte Owen*, 20 N. B. 487 (1881); *Ackman v. Town of Moncton*, 24 N. B. 103 (1884); *Coates v. Town of Moncton*, 25 N. B. 605 (1886); *Ex parte Burke*, 34 N. B. 200 (1896); compare *Bucke v. City of London*, 10 Ont. L. R. 628 (1905), holding retired pay taxable.

⁶ *Regina v. Bowell*, 4 B. C. 498 (1896).

⁷ *Evans v. Hudon*, 22 L. C. Jur. 268 (1877); *Ex parte Killam*, 34 N. B. 530 (1898).

Section 91,^{*} resisted the payment of a Quebec tax on banking, measured by the amount of paid-in capital and the number of branches. The tax was challenged on the ground, among others, that the power to tax involved the power to destroy the bank and the power of the Dominion to create banks, but the Privy Council categorically rejected this argument (pp. 585-587).^{*}

The implications of the *Bank of Toronto* case were pressed further by the Privy Council in *Webb v. Outrim*, (1907) A. C. 81 (see *infra*, pp. 115-116), where it held an officer of the Australian Commonwealth subject to state income taxation.

It is not surprising, then, that in *Abbott v. City of St. John*, 40 Can. Sup. Ct. 597 (1908), the Supreme Court of Canada, with one judge dissenting, held an officer of the Dominion to be subject to a provincial tax on his income. The several opinions relied in part on *Webb v. Outrim*, but rather more on the broad proposition that the Dominion officer should not be exempt from "a general indiscriminatory tax upon the incomes of residents"

^{*} In fact, the Bank of Toronto was incorporated in 1855 by the then parliament of Canada. 12 App. Cas. at 580.

^{*} This refusal to follow the reasoning of *McCulloch v. Maryland* has been continued in subsequent cases. *Brewers & Maltsters' Ass'n v. The Attorney General*, (1897) A. C. 231; *Workmen's Compensation Board v. Canadian Pacific Ry. Co.*, (1920) A. C. 184; cf. *Lymburn v. Mayland*, (1932) A. C. 318; *City of Halifax v. Lyall & Sons Co.*, 85 D. L. R. 305 (1922); *John Deere Plow Co. v. Wharton*, (1915) A. C. 330; *Great West Saddlery Co. v. The King*, (1921) 2 A. C. 91.

(p. 607) because he, as all others, should pay his share of the costs of provincial government: "The Dominion is and has always been able to keep in respectable condition all her civil servants and not to make them dependent on the bounty of any one part of the Dominion * * *" (pp. 612-613). It was recognized that the tax was no interference with the functions of the Dominion, since "no attempt is made to seize or appropriate the income itself, or to anticipate its payment" (p. 616) and the power expressly granted by Section 92 to fix the salaries of Dominion officers was "a subject as far removed as possible" from "the fiscal burdens incident to provincial or municipal citizenship" (p. 618). While *Collector v. Day* was not cited, *McCulloch v. Maryland* was distinguished, in part, on the authority of *Webb v. Outrim* (p. 608) and in part because of the "history leading up to" its decision (p. 613). The reasoning of the *Leprohon* case was expressly disavowed (pp. 614, 619).

The converse situation was presented in *Caron v. The King*, (1924) A. C. 999, and the Privy Council held the Dominion income tax applicable to a cabinet minister in a provincial government. Expressly approving the arguments developed in *Abbott v. City of St. John*, the Court added (p. 1006):

* * * the Parliament of Canada could not exercise its power of taxation so as to destroy the capacity of officials lawfully appointed by the Province.

But the Income Tax Acts * * * are not discriminating statutes. They are statutes for imposing on all citizens contributions according to their annual means, regardless of, or it may be said not having regard to, the source from which their annual means are derived.

Following these decisions, it has frequently been held that both the Dominion and the provinces may tax the salaries paid the officers of the other.¹⁰

2. Australia

The Commonwealth of Australia Constitution Act of 1900, 63 & 64 Vict., c. 12, is quite similar to the United States Constitution, so far at least as the present questions are concerned. The Commonwealth exercises delegated powers, while the states retain all powers not granted (Secs. 51, 107). The Commonwealth legislation is supreme.¹¹ There is an express prohibition against taxing, without

¹⁰ *Dugas v. MacFarlane*, 18 W. L. R. 701 (1911); *Re County Court Judges Income Tax*, 25 O. W. R. 600 (1914); *City of Toronto v. Morson*, 37 O. L. R. 369 (1916); *Attorney-General for Manitoba v. Harper*, 42 Man. 569 (1934); *Worthington v. Attorney General of Manitoba*, (1936) S. C. R. 40, (1936) 1 D. L. R. 465; *Forbes v. Attorney General of Manitoba* (1937), 1 D. L. R. 289; *The Judges v. Attorney General for Saskatchewan*, 54 T. L. R. 464 (P. C., 1937).

¹¹ The Commonwealth legislation prevails in case of conflict (Sec. 109), and is declared binding over all persons in the Commonwealth (Sec. 5).

the government's consent, the property either of the Commonwealth or of the states.¹²

a. *Early Confusion*.—The problem of intergovernmental tax immunity has proved no easier for the Australian than for the American and Canadian courts. Indeed, due to the fact that prior to 1907 appeal to the Privy Council could be taken directly from state courts,¹³ there was, for a brief period, a welter of contradictory decisions which exceeds that known in either of the other federations.

The Supreme Court of Victoria was the first to speak. In *Wollaston's Case*, 28 V. L. R. 357 (1902), it held a Commonwealth official subject to the state income tax and completely rejected the doctrine of implied immunity. The American cases were distinguished on the grounds that the Australian constitution was more easily amended, and that the Crown had power to disallow either commonwealth or state legislation. Two years later the High Court of the Commonwealth reached precisely the opposite conclusion in *D'Emden v. Pedder*, 1 C. L. R. 91. It held that a federal officer could not be subjected to a state stamp tax upon a receipt for his salary. The American cases were

¹² Section 114 provides: "A State shall not, without the consent of the Parliament of the Commonwealth, * * * impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

¹³ See *Webb v. Outrim*, (1907) A. C. 81, 91-92.

said to be regarded "not as an infallible guide but as a most welcome aid and assistance." The tax was regarded as an interference with the power of the Commonwealth to perform its functions and to pay its officers. The Federal High Court reached the same result in *Deakin v. Webb*, 1 C. L. R. 585, and reversed the Victoria court, which had refused to follow the analogy of *D'Emden v. Pedder*. Relying upon the American cases, the court held the state unable to apply its income tax to the salary of a Commonwealth official. It refused to certify the case to the Privy Council.¹⁴ This decision was followed by the Tasmanian court.¹⁵ And, in a case involving regulatory powers, the High Court held that the principle of *D'Emden v. Pedder* served to make the federal arbitration act inapplicable to employees of state railways.¹⁶

The principle of reciprocal immunity was accordingly established in the High Court. The Victoria Court, in *Outrim's Case*, 30 V. L. R. 463 (1905), felt bound by the High Court doctrine and held the salary of a Commonwealth official to be exempt from the state tax. However, the court

¹⁴ 10 Argus L. R. 258 (1904). Such certification was necessary for appeal in Commonwealth constitutional questions. See Section 74 of Commonwealth of Australia Constitution Act, *supra*.

¹⁵ *King v. Bowden*, 1 Tas. L. R. 149 (1905).

¹⁶ *Federated Railway Service Ass'n v. New South Wales Railway Ass'n*, 4 C. L. R. 488 (1906).

granted leave to appeal not to the High Court but to the Privy Council. That court, in *Webb v. Outrim*, (1907) A. C. 81, refused to accept the reasoning of the Commonwealth High Court and reversed. The opinion, by the Earl of Halsbury, disposes of the affirmative case in a paragraph: the state has the power to tax and the Commonwealth Act contains no such restriction on this power as was sought by Outrim (p. 87). The balance of the opinion is devoted to distinguishing the American cases, for "no one would speak lightly of the authority of such a judge as Marshall C. J." (p. 88). The controlling distinction was found in the fact that the legislation of an Australian state required, in theory, the assent of the Crown,¹⁷ and "when it is assented to, it becomes an Act of Parliament," not subject, as was American legislation, to be invalidated because unconstitutional (pp. 88-89). This supposed theoretical supremacy, or parity, of the state legislation seems quite inadmissible as a distinction of the American cases: (1) the Commonwealth legislation is, as in America, supreme over state legislation; (2) it does not distinguish *Collector v. Day*, and the other American cases extending an immunity against federal taxation, which were cited to the Court; (3) it does not permit the decision that discriminatory taxes

¹⁷ 18 & 19 Vict., c. 55, Sec. III. This power has little if any practical significance. See Warner, Problems of Australian Federation, p. 3.

are *ultra vires*, which the Privy Council would undoubtedly hold.¹⁸

However, the High Court of Australia in turn refused to follow the decision of the Privy Council. In *Baxter v. Commissioner of Taxation*, 4 C. L. R. 1087 (1907), it held the New South Wales income tax inapplicable to the salary paid a federal officer. The High Court was held not to be bound by decisions of the Privy Council in cases arising from state courts and the opinion in *Webb v. Outtrim* was declared to contain nothing to cause a reconsideration of the earlier decisions of the High Court. Then, as a final gesture of defiance, the High Court refused to allow a certificate for appeal to the Privy Council.

The intolerable situation caused by this conflict of doctrine led the High Court in *Flint v. Webb*, 4 C. L. R. 1178 (1907), to suggest remedies. There it held the Victoria income tax inapplicable to a Commonwealth employee and again denied a certificate for appeal to the Privy Council. Chief Justice Griffiths suggested that the Commonwealth waive the immunity of federal employees; three justices suggested that the Parliament of the Commonwealth eliminate the right of appeal from state courts to the Privy Council in constitutional cases. Both suggestions were adopted.¹⁹ Because the leg-

¹⁸ Compare *John Deere Plow Co. v. Wharton*, (1915) A. C. 330; *Great West Saddlery Co. v. The King*, (1921) 2 A. C. 91.

¹⁹ Commonwealth Salaries Act, 1907; Judiciary Act, 1907.

islation waiving immunity made the question one of small importance, the Privy Council refused leave to appeal, on an application made directly to it, in the *Baxter and Flint* cases.²⁰

b. *Removal of Immunity*.—The legislation removing the immunity of federal salaries was sustained in *Chaplin v. Commissioner of Taxes*, 12 C. L. R. 375 (1911). But, in cases not covered by this legislation, the doctrine of intergovernmental immunity was a problem which the courts alone were forced to work out. The litigation of the next decade showed a gradually accelerating tendency to eliminate all immunity of private persons from nondiscriminatory taxation.²¹

Finally, in 1920 the High Court, in *Amalgamated Society of Engineers v. Adelaide Steamship Co., Ltd.*, 28 C. L. R. 129, cleanly swept away the doctrine of an implied and reciprocal immunity. The union was engaged in an industrial dispute with the steamship company and other employers throughout the Commonwealth, including a num-

²⁰ *Commissioners of Taxation v. Baxter, Webb v. Flint*, (1908) A. C. 214.

²¹ *Heiner v. Scott*, 19 C. L. R. 381 (1914); *Attorney General of New South Wales v. Collector of Customs*, 5 C. L. R. 818 (1908); *Commonwealth v. New South Wales*, 25 C. L. R. 325 (1918); *Attorney General for Queensland v. Attorney General for the Commonwealth*, 20 C. L. R. 148 (1915); *Federated Engine Drivers Ass'n v. The Broken Hill Co., Ltd.*, 12 C. L. R. 398, 415 (1911); *Federated Engine Drivers Ass'n v. The Broken Hill Co., Ltd.*, 16 C. L. R. 245 (1913); *Federated Municipal Employees Union v. City of Melbourne*, 26 C. L. R. 508 (1919).

ber of state departments and enterprises; the question was whether the Commonwealth arbitration act applied to the state employers. The court, in a five to one decision, held the act applicable. The reasoning of the opinion, and the emphatic nature of the court's repentance, are instructive (pp. 151, 156, 157):

The ordinary meaning of the terms employed in one place may be restricted by terms used elsewhere: that is pure legal construction. But once their true meaning is so ascertained, they cannot be further limited by fear of abuse. * * * the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts. * * *

* * * * *

So far as any observation in that case [*D'Emden v. Pedder*] can be regarded as favouring a reciprocal doctrine creating invalidity of Commonwealth legislation by reason of State Constitution or legislation, that observation must be considered as unwarranted by the Constitution and overruled.

* * * * *

It is apparent that if, as we have stated, the true basis of *D'Emden v. Pedder* is the supremacy of Commonwealth law over State law where they meet on any field, there can be no possible reciprocity. Mutual supremacy is a contradiction of terms.

The High Court refused a certificate for appeal to the Privy Counsel (29 C. L. R. 406) and that court, for want of jurisdiction in the absence of a certificate, denied a leave for appeal addressed directly to it.²²

On the authority of the *Engineers Case*, the High Court in *Davoren v. Commonwealth Commissioner of Taxation*, 32 C. L. R. 616, 29 A. L. R. 129 (1923), held that the Commonwealth income tax could be applied to state officers.²³

Finally, in *West v. Commissioner of Taxation*, 56 C. L. R. 657 (1937), the High Court made its definitive pronouncement. West, a retired Commonwealth officer, was subjected to income taxation by New South Wales on his pension. The Commonwealth Salaries Act, 1907, permitting state taxation of salaries, did not cover pensions. The Financial Emergencies Act, 1931, in Section 19 provided that the Governor-General by regulation might fix the maximum state taxation of salaries and pensions; he had not acted. The six justices, in separate opinions, sustained the tax. None of them doubted that "general undiscriminatory State income tax laws" were "not inconsistent with Federal laws relating to such salaries or pensions."²⁴

²²*Minister for Trading Concerns v. Amalgamated Society of Engineers*, (1923) A. C. 170.

²³See, also, *Stuart-Robertson v. Lloyd*, 47 C. L. R. 482 (1932); *Pirrie v. McFarlane*, 36 C. L. R. 170 (1925).

²⁴Latham, C. J. (p. 668); see also Rich (p. 674), Dixon (p. 678) and Evatt (pp. 687, 709-710), JJ.

None doubted that the Australian constitution was well rid of "the elusive doctrine of the immunity."²⁵ Indeed, Justice Evatt said (p. 699):

Although, therefore, the attempt of *Griffith, C. J.* to enunciate the rule of non-interference ended in disaster, this was due, perhaps, to over-anxiety as to the dangers which confronted the newly established Commonwealth. These dangers were greatly, and, as we would now suppose, even absurdly exaggerated. For instance, how the Commonwealth itself could possibly be injured because its officers had to bear the same taxation burdens as their fellow citizens, it is almost impossible to appreciate.

The court differed only on the speculative question as to whether the Commonwealth supremacy reached to the point that the Parliament might affirmatively provide for immunity from taxation on salaries. The majority of the court thought it could;²⁶ Justice Evatt thought there was no such power.²⁷ But the failure affirmatively to provide

²⁵ Starke, J. (pp. 676-677); see Evatt, J. (p. 684):

"At first glance this claim of immunity from the operation of legislation of a State which imposes taxes upon all incomes and pensions indifferently, would appear to be extremely novel, not to say daring. But a number of prior decisions of this court negative such appearance, and some reference must be made to

"'Old, unhappy, far-off things
And battles long ago.'"

²⁶ Latham, C. J. (pp. 672-673); Rich, J. (p. 674); Starke, J. (p. 677); McTiernan, J. (p. 714).

²⁷ Pp. 684, 685, 702, 703, 709.

such an exemption was taken by all to mean that the pensions were taxable.

It results that there is no longer a doctrine of reciprocal immunity in Australia and that the private person can claim immunity from nondiscriminatory taxation only (1) if he derives his claim from the Commonwealth, not a state, and (2) if the Commonwealth Parliament has affirmatively provided for his immunity. This doctrine is not a rule of immunity, implied from the nature of a federated system, but is purely one of federal supremacy.

In Australia, then, as in Canada, the earlier rules of immunity have almost if not entirely disappeared. There are some differences in constitutional theory which might prevent these cases from being completely analogous to the American problems, even though the earlier rule of immunity was based on the American cases. But the experience of these jurisdictions is compelling evidence that there is no practical reason why a federated nation requires a rule of tax immunity for private persons, and that the operation of such a rule may sometimes prove so unsatisfactory that its abandonment follows hard on the heels of its adoption.

IV

CONGRESS HAS NOT GRANTED IMMUNITY, AND IT IS NOT TO BE IMPLIED FROM THE SILENCE OF CONGRESS

We have shown that the Constitution of its own force does not exempt the government officer or employee from an income tax on his salary.

But, since the tax is a state tax and since the employee is a federal employee, his tax liability or immunity cannot be determined without consideration of the further question of Congressional action. This question at the present time is not free from difficulty and the Court could, we believe, reasonably reach either conclusion as to the Congressional intention. Under these circumstances an express declaration by Congress would, of course, provide the most satisfactory answer.

1. Congress has provided neither immunity nor liability. Nowhere in the statute books is there a provision which either provides or waives immunity of federal officers and employees from state income taxation.

Nor do the statutes relating specifically to the Home Owners' Loan Corporation reach this problem. Section 4 (c) of the Home Owners' Loan Act of 1933 does not touch the question of the tax liability of officers and employees. It merely provides:

The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be

exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed.

Congress quite plainly did not intend to cover the entire field of tax liability or exemption by this provision.²⁸ The bond exemption was enacted, one supposes, to give express notice to prospective purchasers; the other provisions relate solely to the activities and property of the Corporation itself. The Congressional intention as to the tax liability or immunity of the officers and employees cannot be gathered even by remote implication.²⁹

It results that Congress has remained wholly silent. This, we submit, must close the inquiry; if there is no statutory provision, the case is governed by the Constitution alone.

2. We recognize, however, that in the somewhat analogous field of interstate commerce there has developed a doctrine which reads meaning into the silence of Congress, and finds immunity or liability to taxation or regulation according as Congress is supposed by its silence to have intended. The doc-

²⁸ Compare, in regard to the comparable provision in the Reconstruction Finance Corporation Act, *Baltimore National Bank v. State Tax Commission*, 297 U. S. 209, 214-215, with Sen. Rep. No. 1545 and House Rep. No. 2199, 74th Cong., 2d Sess.

²⁹ If one were to argue that the specification of one form of taxation excluded others, he would reach a stalemate, since the section provides both specific exemptions and specific waivers of immunity.

trine has been criticized by constitutional theorists,⁸⁰ but has an important practical utility, in that it permits enforcement of the implied prohibitions of the commerce clause without stripping Congress of the power to commit the matter to state control if this seems to it to be desirable in the national interest. There is, however, no such need for an analogous doctrine in the field of tax immunity. The scope of the state taxing power is not limited by a delegation of an exclusive power to Congress, so the state taxing act which does not offend against the Constitution itself stands in no need of the bulwark of a Congressional approval to be implied from its silence. In addition, while the implications of the Constitution and such tax exemptions as may be provided by Congress set a limit to the state power, these limitations may, quite without regard to any doctrine of Congressional silence, be waived or eliminated by Congress. There is, therefore, no necessity to find an implied support or condemnation of the state tax in the silence of Congress, for Congress has in any event full power to make such adjustments as seem desirable.

If, however, the analogy of the commerce clause is to be applied to the problems of tax immunity, and affirmative implications drawn from the silence of Congress, we submit that this silence should not be construed to mean immunity.

⁸⁰ See, e. g., Biklé, *The Silence of Congress*, 41 Harv. Law Rev. 200; Powell, *The Still Small Voice of the Commerce Clause*, 3 Selected Essays on Constitutional Law 931.

The line of demarcation in the commerce-clause cases is that which divides subjects requiring in their nature a national uniformity of regulation from those as to which local regulation might apply. *Kelly v. Washington*, 302 U. S. 1, 14; *Minnesota Rate Cases*, 230 U. S. 352, 399-400; *Cooley v. Board of Wardens*, 12 How. 299, 319. If this formula were adapted to the problems of tax immunity, it would seem to divide state taxes upon Federal instrumentalities or those who deal with the United States into two classes: those taxes the economic burden of which would largely be borne by the United States and those which had no such effect upon the Federal Government. Phrased in less precise terms, the silence of Congress might be supposed to condemn taxes which were a direct burden on the operations of the United States and to sanction those which had only an indirect or remote influence.

Measured by these standards, it seems clear enough that the silence of Congress should not be taken to mean an immunity of its officers and employees from nondiscriminatory state income taxation. We have already shown (*supra*, pp. 74-80) that the amount of the government salary is not certain to be reflected in the income tax paid; that the value of the exemption privilege varies according to the income of the officer or employee; that it is quite unlikely that the tax immunity bounty attached to government service plays an appreciable part in the decision of one considering gov-

ernment work; and that the government will receive little or none of the benefit of the privilege. Under such circumstances it hardly can be thought that the government would largely bear the burden of the nondiscriminatory net income tax upon its officer or employee, or that the tax would be a direct burden on its operations. By the same token, there is no occasion to impute to the silence of Congress an intention that there be exemption. Indeed, if the United States is in no manner affected by the tax, a Congressional desire for immunity would seem the equivalent of intending merely to bestow a bounty unrelated to the Federal functions and at the cost of the state revenues. We know of neither reason nor precedent to support a belief that Congress would intend any such result.

In short, nothing less than affirmative legislation should be allowed as a token of a Congressional intention to penalize the revenue systems of the states for the sole benefit of a privileged class of taxpayers. That this class consists of officers and employees of the United States is wholly immaterial unless it be shown, as we are confident it cannot be, that the tax burden would adversely affect the operations of the United States.

3. The conclusion that Congress can not be assumed to have intended that federal officers and employees be exempt from a nondiscriminatory state tax on net income finds ample support in the decisions of this Court.

The Court has permitted state taxation of private persons who dealt with the United States in forty-odd cases. In most of these the tax has been sustained without thought that the silence of Congress might be taken to mean immunity; in others the Court has expressly relied on the failure of Congress to provide immunity as showing the validity of the tax. We have found no case where the silence of Congress has been construed as an expression of a Congressional intention that there be exemption; cases reaching a conclusion of immunity in the absence of legislation have relied on the Constitution alone.

In many of these cases the United States would more probably bear some part of the economic burden of the tax than is the case with a net income tax on salaries. The taxes which have been held valid include, for example, gross and net income taxes on government contractors,³¹ property taxes on agents and contractors,³² and sales taxes on their

³¹ *James v. Dravo Contracting Co.*, 302 U. S. 134; *Mason Co. v. Tax Commission*, 302 U. S. 186; *Atkinson v. Tax Commission*, 303 U. S. 20; *General Construction Co. v. Fisher*, 295 U. S. 715; see *Alward v. Johnson*, 282 U. S. 509; *Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319.

³² *Choctaw O. & G. Railroad Co. v. Mackey*, 256 U. S. 531; *Gromer v. Standard Dredging Co.*, 224 U. S. 362; *Baltimore Shipbuilding Co. v. Baltimore*, 195 U. S. 375; *Western Union Tel. Co. v. Gottlieb*, 190 U. S. 412; *Central Pacific Railroad v. California*, 162 U. S. 91; *Railroad Co. v. Peniston*, 18 Wall. 5; *Thomson v. Pacific Railroad*, 9 Wall. 579.

transactions,³³ a bequest to the United States,³⁴ an inheritance tax on the transfer of federal securities,³⁵ and corporate franchise taxes which included the value of United States bonds in their measure.³⁶ Other cases are listed in the margin.³⁷ If the silence of Congress did not mean an unexpressed intention to exempt in these cases, it is difficult to understand that it should have a different interpretation in the case of a tax so remote from the functions of government as the net income tax upon an officer or employee.

³³ *Trinityfarm Co. v. Grosjean*, 291 U. S. 466; *Tirrell v. Johnston*, 293 U. S. 533.

³⁴ *United States v. Perkins*, 163 U. S. 625.

³⁵ *Plummer v. Coler*, 178 U. S. 115.

³⁶ *Home Ins. Co. v. New York*, 134 U. S. 594; *Society for Savings v. Coite*, 6 Wall. 594; *Provident Institution v. Massachusetts*, 6 Wall. 611; *Hamilton Co. v. Massachusetts*, 6 Wall. 632.

³⁷ Property tax on officer: *Dyer v. City of Melrose*, 215 U. S. 594; tax on shares of corporations holding federal bonds: *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 113; *Des Moines Bank v. Fairweather*, 263 U. S. 103; *National Bank v. Commonwealth*, 9 Wall. 353; *People v. Commissioners*, 4 Wall. 244; property tax on lessee: *Taber v. Indian Territory Co.*, 300 U. S. 1; *Indian Territory Oil Co. v. Board*, 288 U. S. 325; *Wagoner v. Evans*, 170 U. S. 588; *Thomas v. Gay*, 169 U. S. 264; income and franchise taxes on licensee: *Fox Film Corp. v. Doyal*, 286 U. S. 123; *Educational Films Corp. v. Ward*, 282 U. S. 379; property tax on licensee: *Broad River Power Co. v. Query*, 288 U. S. 178; *Susquehanna Co. v. Tax Commission (No. 1)*, 283 U. S. 291; income and property taxes on Indians: *Leahy v. State Treasurer*, 297 U. S. 420; *Shaw v. Oil Corporation*, 276 U. S. 575; *Goudy v. Meath*, 203 U. S. 146; lands purchased by guardian with War Risk Insurance benefits: *Trotter v. Tennessee*, 290 U. S. 354.

The guiding principle, which explains this consistent refusal to interpret the silence of Congress to mean a legislative purpose to exempt, has been set forth in *Shaw v. Oil Corporation*, 276 U. S. 575. The Court there contrasted a property tax on lands, purchased by an Indian ward out of oil royalties, with taxes from which exemption had been granted because of the implications of the Constitution. It said (p. 578) that the lands "are not such instrumentalities of the government as will be declared immune from taxation in the absence of an express exemption by Congress." Although, the Court continued (p. 581), "Congress may protect them for state taxation, [they] will nevertheless be subject to that taxation unless Congress speaks."

The requirement has been stated in many cases that there must be an express provision by Congress if a purpose to exempt a private person from an otherwise constitutional tax is to be assumed. The Court sustained a general business license tax on a federal licensee because "the national government has not assumed * * * to exercise any control over the taxation * * * by the state." *Federal Compress Co. v. McLean*, 291 U. S. 17, 23. It sustained a tax on realty purchased with exempt benefits under the War Risk Insurance Act because "We see no token of a purpose to extend * * * immunity to permanent investments." *Trotter v. Tennessee*, 290 U. S. 354, 357. It overruled *Long v. Rockwood*, 277 U. S. 142, and sustained a state tax on copyright income in part because the Congress

did not "provide that the right, or the gains from its exercise, should be free of tax." *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127. The Court upheld a state tax on unrestricted Indian allotments because any intention of Congress to exempt "should be clearly manifested," and "no exemption is clearly shown by the legislation in respect to these Indian lands." *Goudy v. Meath*, 203 U. S. 146, 149. Recognizing the power of Congress to exempt the property of its agents from taxation, the Court sustained such a tax because "Congress did not see fit to do so here." *Central Pacific Railroad Co. v. California*, 162 U. S. 91, 125. Other cases similarly make express reference to the absence of a Congressional exemption, and, at least in part, for that reason sustain the challenged tax. *Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319, 323-324; *Hibernia Savings Society v. San Francisco*, 200 U. S. 310, 315-316; *Plummer v. Coler*, 178 U. S. 115, 134-135; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 548; *Thomson v. Pacific Railroad*, 9 Wall. 579, 589, 592; *National Bank v. Commonwealth*, 9 Wall. 353, 363. —

Finally, in *James v. Dravo Contracting Co.*, 302 U. S. 134, the Court sustained a gross receipts tax as applied to a contractor for the United States. Such a tax plainly bears with much greater force on the operations of the United States than does a net income tax on the government officer or employee. In the *Dravo* case the Government admitted

that the economic burden of such a tax would largely be passed on to the United States. Here it insists that sustaining the tax will result in no added cost to the United States. In that case, as here, Congress had made no provision for exemption or liability. Yet the Court sustained the tax, and expressly recognized the power of Congress to act if such taxation should prove burdensome or oppressive (pp. 160-161). It necessarily follows that the silence of Congress cannot be taken to imply a purpose to exempt from a tax so remote from the operations of government as is the net income tax on the salary of the officer or employee.

4. There remains only the possible argument that Congress has had full power to waive the supposed immunity from state taxation of its officers and employees (see *supra*, p. 40), and that it has not done so. In the field of interstate commerce the Court has found an implied acceptance by Congress of its rules, formulated under the commerce clause alone, in the fact that Congress has not acted. *Gwin, White & Prince, Inc. v. Henneford*, No. 75, October Term, 1938, decided January 3, 1939. Such an implied acceptance cannot, however, be found here.

In the first place, the responsibility of Congress is quite different with respect to intergovernmental tax immunity than it is with respect to interstate commerce. Under the commerce clause Congress has the implied duty to regulate, in order that trade may be free, and that the nation may be

a single economic society. A failure to act is quite likely therefore to betoken approval of the rules of the Court under the commerce clause. But whether or not the state is able to collect a nondiscriminatory net income tax from an officer or employee of the United States is a problem which primarily concerns the state and the taxpayer alone; as we have shown (*supra*, pp. 74-80), such a tax has no effect whatever on the operations of the United States. Congress may often waive an immunity which might otherwise be claimed by those who deal with it, and may choose expressly to waive immunities which could not in any event be claimed, but in either case it acts out of solicitude for state revenues and not, as under the commerce clause, in response to a duty placed on it by the Constitution.

In the second place, so long as *Collector v. Day*, 11 Wall. 113, stood unchallenged, the Federal Government was unable to impose its income tax upon the salaries of state officers and (as it was thought) employees. Even though such a tax did not burden the Government when applied to its officers and employees, Congress might well hesitate to eliminate only one-half of an unfortunate rule.²² The protests of federal officers and employees at being

²² The states, as this Court has noted in *Helvering v. Gerhardt*, 304 U. S. 405, 417, would have no corresponding inducement to waive the supposed immunity.

deprived of this privilege would come with much force when bulwarked by the charge that state officers and employees would retain their privileged status. And, if federal immunity were removed, this would serve only to accentuate the discriminatory and unfair privilege extended those who served the states.

Finally, two decisions of the Court make it plain that there is no implied approval by Congress if it fails to act after this Court has announced a rule of immunity. Congress did not waive the tax immunity of patent and copyright owners after the decision in *Long v. Rockwood*, 277 U. S. 142. But when that case was reversed in *Fox Film Corp. v. Doyal*, 286 U. S. 123, the Court found no acceptance of its earlier doctrine and, indeed, relied upon the silence of Congress to show taxability (pp. 127, 129). Without here stopping to inquire how far the sales tax cases²⁹ pointed to a result contrary to that reached in *James v. Dravo Contracting Co.*, 302 U. S. 134, it may be said that the ruling in that case considerably, and wisely, contracted the limits of tax immunity from what they had earlier been thought to be. Yet the Court found no implication of Congressional approval of the older rule and again expressly referred to the power of Congress

²⁹ *Panhandle Oil Co. v. Knox*, 277 U. S. 218; *Indian Motorcycle Co. v. United States*, 283 U. S. 570; *Graves v. Texas Co.*, 298 U. S. 393.

to grant exemption against unduly burdensome taxes of the nature there considered.

5. It is true that Congress, as this brief is filed, is devoting much time to a program which includes subjecting both federal and state officers and employees to income taxation by the other government. See Brief for Respondent in *State Tax Commission v. Van Cott*, No. 491, this Term (pp. 42, 49-59). Various statements made before committees, quoted in the brief cited above, discuss a "waiver" of the immunity of Federal officers and employees. But it is settled that such statements cannot be used to determine the intent of Congress. *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 493-494; cf. *Lapina v. Williams*, 232 U. S. 78, 90. Here the applicable committee report (H. Rpt. No. 26, 76th Cong., 1st Sess., pp. 2, 4), recommending the passage of the "Public Salary Act of 1939" speaks of providing an "express consent" to the taxation of federal salaries after December 31, 1938.

It results, therefore, that the failure of Congress to provide either tax exemption or liability cannot be construed as an approval of the immunity of federal officers and employees from a nondiscriminatory state income tax which includes the federal salary in its basis.

CONCLUSION

It seems that the operation of Section 359-2-f of the New York Tax Law, exempting the compensation of officers and employees of the United

States, is a question of state law and cannot be examined here.

We urge that there can be no doctrine denying the immunity of the United States to activities characterized as "proprietary" or "nonessential," and that the relator, an employee of the Home Owners' Loan Corporation, has the same immunity as that of any employee of the United States. Since Congress has not exempted federal officers and employees from state taxation, the question relates only to the force of the implied prohibitions of the Constitution.

We have urged that a nondiscriminatory tax on net income which includes the government salary in gross income has no relation to the functions of the government and serves only to give the government officer or employee an unfair and discriminatory advantage over private citizens, with whom he shares virtually all of the benefits of government. If this Court were to overrule *Collector v. Day*, 11 Wall. 113, as we request, it would make a most significant contribution to the orderly and equitable administration of the revenues of both the states and the nation. Such a decision would also eliminate confusion and contradiction from the law of tax immunity, and would measurably lessen the continuing stream of litigation, with all the consequent evils of delay and uncertainty, which must of necessity continue so long as the controlling decisions of this Court include, on the one hand,

Collector v. Day, and, on the other hand, the numerous decisions of recent years which each serve, to a greater or lesser extent, further to impair its authority.

For these reasons we agree with the conclusion of the Attorney General of New York and therefore respectfully submit that the decision of the court below should be reversed.

ROBERT H. JACKSON,
Solicitor General.

JAMES W. MORRIS,
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FEBRUARY 1939.

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Joint Supplemental Report to the United States

Department of Justice, 1968

**MARSH CROFT, JOHN J. MURPHY, AND JOHN P.
HENDERSON, AS COMMISSIONERS OF THE STATE TAX
COMMISSION OF THE STATE OF NEW
YORK, RESPONDENTS**

**THE PEOPLE OF THE STATE OF NEW YORK UPON THE
RELATION OF JAMES B. O'KEEFE**

**ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE
STATE OF NEW YORK**

**SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE**

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 478

MARK GRAVES, JOHN J. MERRILL, AND JOHN P.
HENNESSY, AS COMMISSIONERS CONSTITUTING THE
STATE TAX COMMISSION OF THE STATE OF NEW
YORK, PETITIONERS

v.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE
RELATION OF JAMES B. O'KEEFE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF NEW YORK

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE

The supplemental brief for respondent in *State Tax Commission of Utah v. Van Cott*, No. 491, October Term, 1938, calls to the attention of the Court the legislative developments with respect to H. R. 3590, 76th Cong., 1st Sess., subsequent to the time that the main briefs were filed. Respondent reads these legislative developments as indicative

(1)

of a Congressional understanding and intention that the compensation of federal officers and employees should be exempt from state income taxation prior to January 1, 1939. The bill, which has passed the House and is now pending before the Senate, together with the reports of the House Ways and Means Committee (H. Rpt. No. 26) and the Senate Finance Committee (S. Rpt. No. 112), are reprinted in the Appendix of the supplemental brief for the respondent in the Van Cott case.

We have no thought to disparage the strength of the implications which respondent draws from this bill and the statements of the Committees which have reported it. We feel, however, that a somewhat fuller examination of these legislative developments indicates, not that the Congress intended there to be an immunity for federal officers and employees prior to January 1, 1939, but that the Congress was doubtful as to the existence of such an exemption in the past and wished to make it plain that in the future there should be no immunity from state income taxation.

Section 3 of H. R. 3790 provides:

The United States hereby consents to the taxation of compensation, received after December 31, 1938, for personal service as an officer or employee of the United States, any Territory or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one

or more of the foregoing, by any duly constituted taxing authority having jurisdiction to tax such compensation, if such taxation does not discriminate against such officer or employee because of the source of such compensation.

It will be noted that the bill in terms is directed only to compensation received after December 31, 1938. There is neither prohibition of nor consent to taxation of compensation received prior to that date. The respondent in the *Van Cott* case draws from this an implication that the Congress intended compensation received in 1938 and before to be exempt. This is a permissible implication. At least equally permissible, however, is the inference that the Congress did no more than to withhold its consent to the taxation of compensation received in and before 1938, so that the tax liability for those years should be determined in the absence of any Congressional action as to taxability or immunity. In this view, the question must turn on the force of the Constitution alone.

To resolve these conflicting inferences it is necessary, as respondent in the *Van Cott* case has done, to resort to the Committee Reports. We think that, taken as a whole, these reports show that the Congress was uncertain as to the strength of the foundations which supported the supposed immunity of federal officers and employees, and that, without determining the question as to compensa-

tion received in 1938 and before, it desired to make it plain that there should be no immunity for compensation received after January 1, 1939. We shall discuss the relevant parts of the Committee Reports in sequence.

1. The introductory portion of the House Report shows that the Committee considered federal officers and employees to be exempt under the implications of the Constitution, as construed by this Court, but that the Committee considered that the principles leading to this supposed exemption might be mistaken. It reads:

These exemptions [of State and Federal officers and employees], which are not provided expressly in the Constitution, have been thought to be required by the decisions of the Supreme Court, based upon the implications of the Constitution. Several recent decisions * * * make it clear that many of the assumptions heretofore entertained as to the scope of these tax immunities are erroneous.

2. After discussing the probable liability of state officers and employees to federal taxation, the Committee Report continues that the case of federal officers and employees "however, may be governed by other considerations." It speaks of "certain indications" in *McCulloch v. Maryland* and in *Helvering v. Gerhardt* pointing to a greater immunity on the part of federal officers and employees than

with respect to those of the States. The report then continues:

Your Committee believes that it is essential to a fair solution of the problem presented by intergovernmental tax immunities that Federal officers and employees should, like other individuals, be subject to income taxation under the authority of the States. The bill, therefore, contains an *express* consent to such taxation. [*Italics added.*]

The Committee hardly would have spoken of an "express" consent to taxation if it had thought that there was an implied prohibition prior to enactment of the legislation.

3. Respondent in the *Van Cott* case finds the House Report, when it speaks of the fact that no provision for subjecting federal officers and employees to federal taxation is necessary, indicative that the Committee considered legislation to be necessary in order to subject federal officers and employees to state taxation. This paragraph of the House Report, however, is equally compatible with the belief that the Congress was uncertain as to their liability to state taxation, while there was no corresponding question as to the liability of federal officers and employees to federal taxation.

4. In the detailed explanation of the particular sections, the House Report describes the purpose of Section 3 as follows:

In order to facilitate reciprocal taxation as between State and Federal Governments,

your committee believes that the United States should expressly consent to the taxation of the compensation of its officers and employees.

Here, again, the House Committee indicates by implication that the section was not certainly necessary; indeed, it suggests that its purpose is simply to make the liability plain, and thus to facilitate reciprocal taxation.

5. Finally, in concluding its technical discussion of Title I, the House Committee says that Section 3 "consents to taxation of Federal officers and employees only with respect to compensation received after December 31, 1938." We have never suggested that the consent was designed to reach back to earlier dates. But the limited nature of the consent does not carry respondent's point, for the question still remains as to the liability of federal officers and employees in the absence of Congressional consent.

6. The introductory portions of the Senate Report state that Title I "grants consent to the States to tax the compensation received after December 31, 1938, by Federal officers and employees." Here, again, there is no indication as to the Committee's understanding of the situation in 1938 and before, in the absence of consent. The failure of the Committee to say that it was granting an "express" consent is unimportant, since later portions of the Report in terms speak of an "express" consent.

7. In discussing the economic aspects of the proposed legislation, the Senate Committee states:

At the present time, Federal employees are subject to Federal income taxes, but are exempt from State income taxes.

This seems more probably to be directed to the supposed implications of the Constitution than to any estimate of the Congressional intention.

8. At a later point, in the first paragraph under the section entitled "Constitutional Aspects," the Committee says:

There is no corresponding problem with respect to the State taxation of the salaries paid to Federal officers and employees, since Congress apparently has power to waive any immunity which might attach to its employees.

This extract shows that the Committee considered the existence of an immunity a matter of at least some doubt. This doubt is incompatible with any understanding that Congress had, by its silence, exempted federal officers and employees from state income taxation.

9. The Senate Committee, in the third of its paragraphs offering possible distinctions of *Collector v. Day*, said that "The proposed legislation does permit the States to tax Federal salaries." This summary statement of Congressional permission should, of course, be read with the portions of the Committee Report which deal in terms with the

consent of Congress, and which indicate that the Committee saw no clear implication of a Congressional intention that there be exemptions for the earlier years.

10. At a somewhat later point in the discussion of the constitutional aspects, the Senate Committee says:

It is believed that the bill will afford to the Court a proper opportunity to redefine and clarify the limits to which governments may go in subjecting the compensation of public employees to taxation.

This paragraph of the Senate Committee suggests that the purpose of the legislation is to clarify rather than to change the existing law.

11. The philosophy back of the legislation is applicable equally to federal as to state officers and employees. In connection with the latter group the Senate Committee, in its description of Section 1, said:


The Committee believes that it is desirable to amend the statute to remove all doubts, so that any presentation of the constitutional question with respect to taxation of Government employees will not be fettered by any problem of statutory construction.

12. In its technical discussion of Section 3, the Senate Committee repeats the discussion in the House Report, explaining that the United States "should expressly consent" to the taxation of its

officers and employees in order to facilitate reciprocal taxation.

We think it difficult to read these various portions of the Committee Reports without coming to the conclusion that, so far as they express the intention of Congress, the legislature has no fixed views or intention as to the liability of federal officers and employees to state taxation on compensation received prior to January 1, 1939. The purpose of the legislation is to present a clear-cut issue looking to the removal of the supposed constitutional exemption of government officers and employees from taxation by another government. As we read the reports, the Committees take some pains to avoid committing themselves as to the liability of federal officers and employees to state income taxation in the absence of an express Congressional consent. In other words, the Committees themselves could read no Congressional intention for exemption of federal officers and employees out of the mere silence of Congress.

There are, indeed, contrary implications to be drawn from some parts of the Committee Reports, which we have discussed above. The contrary implications show a considerable doubt on the part of the Committees as to what, in the absence of Congressional consent, might be the rule of the Court with respect to the state taxation of the compensation paid federal officers and employees. We have



no hesitancy in confessing to a similar doubt. This doubt and confusion traces, of course, to the fact that the decisions of this Court in the field of inter-governmental tax immunity have not followed any very fixed course, with the result that most conclusions will depend upon which of the alternative decisions is chosen as a premise. The situation is one in which clarification is so greatly needed that we feel justified in urging the Court to resolve the conflicting inferences to be drawn from the Committee Reports in the manner best adapted to that end. It would seem unduly artificial to decide this case upon any implication of Congressional intention when that intention, in turn can be implied only from suppositions as to the desire of Congress in a field of shifting principles which have been formulated and modified almost entirely by the courts alone. When the Congress cannot with confidence predict whether the Court in any given case will follow or reject *Collector v. Day*, it is difficult to read into its silence a desire that federal officers have a corresponding immunity.

It is sufficient, we believe, that the Committee Reports, on the whole, disclose no clear indication of a Congressional intention for immunity of federal officers and employees, and that they can with confidence be said to show only that the Congress did not know whether or not federal officers and

employees were liable for state income taxes upon compensation received in and before 1938. The question, in our opinion, remains one to be decided under the Constitution alone.

It is, therefore, respectfully submitted that the decision of the court below should be reversed.

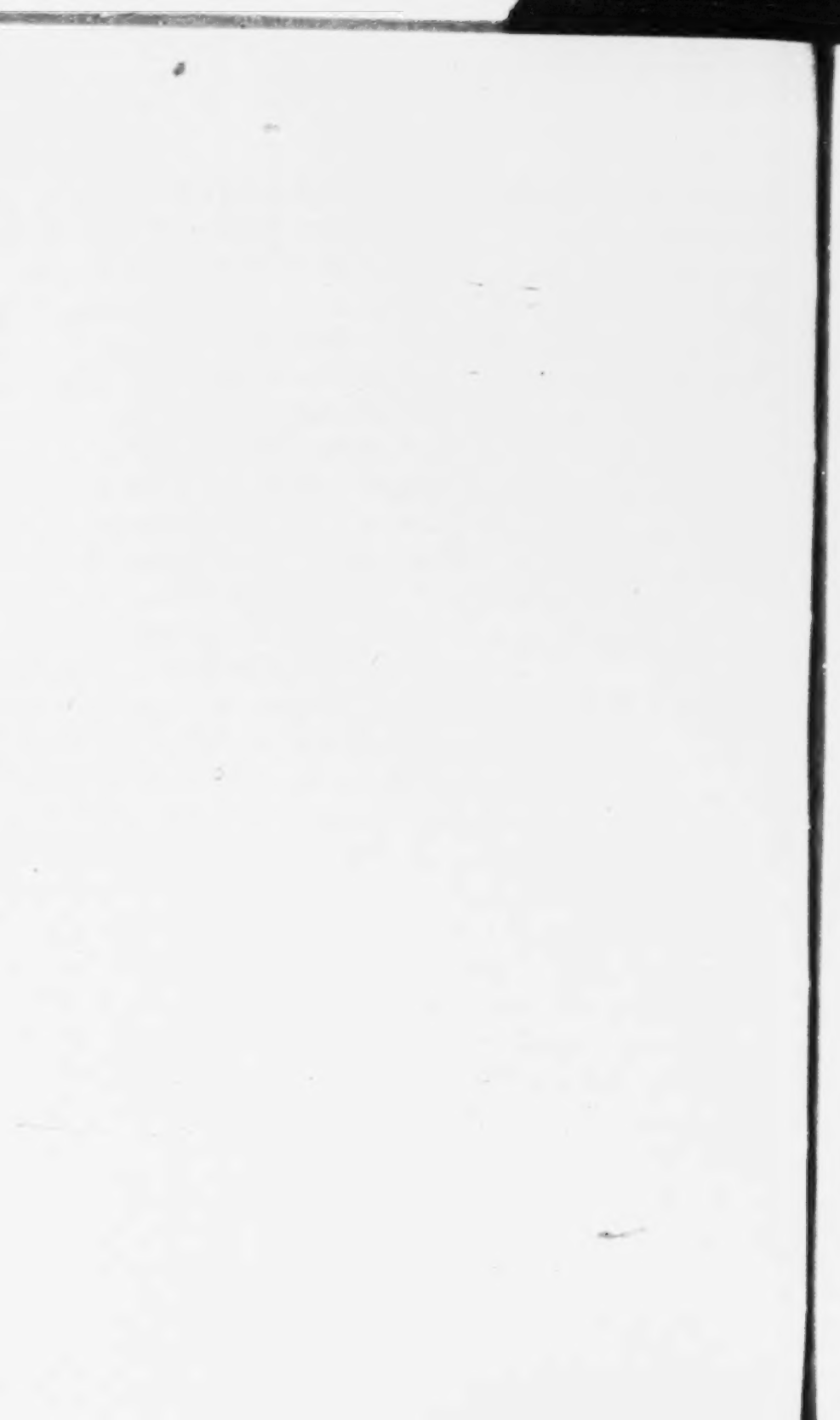
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Special Attorney.

MARCH 1939.



SUPREME COURT OF THE UNITED STATES.

No. 478.—OCTOBER TERM, 1938.

Mark Graves, John J. Merrill and
John P. Henneasy, as Commissioners
Constituting the State Tax Commis-
sion of the State of New York, Pe-
titioners,

vs.

On Writ of Certiorari to
the Supreme Court of
the State of New York.

The People of the State of New York,
Upon the Relation of James B.
O'Keefe.

[March 27, 1939.]

Mr. Justice STONE delivered the opinion of the Court.

We are asked to decide whether the imposition by the State of New York of an income tax on the salary of an employee of the Home Owners' Loan Corporation places an unconstitutional burden upon the federal government.

Respondent, a resident of New York, was employed during 1934 as an examining attorney for the Home Owners' Loan Corporation at an annual salary of \$2,400. In his income tax return for that year he included his salary as subject to the New York state income tax imposed by Art. 16 of the Tax Law of New York (Consol. Laws, c. 60). Subdivision 2f of § 359, since repealed, exempted from the tax "Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States. . . ." Petitioners, New York State Tax Commissioners, rejected respondent's claim for a refund of the tax based on the ground that his salary was constitutionally exempt from state taxation because the Home Owners' Loan Corporation is an instrumentality of the United States Government and that he, during the taxable year, was an employee of the federal government engaged in the performance of a governmental function.

On review by certiorari the Board's action was set aside by the Appellate Division of the Supreme Court of New York, 253 App.

Div. 91, whose order was affirmed by the Court of Appeals. 278 N. Y. 221. Both courts held respondent's salary was free from tax on the authority of *New York ex rel. Rogers v. Graves*, 299 U. S. 401, which sustained the claim that New York could not constitutionally tax the salary of an employee of the Panama Rail Road Company, a wholly-owned corporate instrumentality of the United States. We granted certiorari December 19, 1938, the constitutional question presented by the record being of public importance.

The Home Owners' Loan Corporation was created pursuant to § 4(a) of the Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U. S. C. § 1461 *et seq.*, which was enacted to provide emergency relief to home owners, particularly to assist them with respect to home mortgage indebtedness. The corporation, which is authorized to lend money to home owners on mortgages and to refinance home mortgage loans within the purview of the Act, is declared by § 4(a) to be an instrumentality of the United States. Its shares of stock are wholly government-owned. § 4(b). Its funds are deposited in the Treasury of the United States, and the compensation of its employees is paid by drafts upon the Treasury.

For the purposes of this case we may assume that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the federal government. Cf. *Kay v. United States*, 303 U. S. 1. As that government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation. *McCulloch v. Maryland*, 4 Wheat. 316, 432; *Van Brocklin v. Tennessee*, 117 U. S. 151, 158-159; *South Carolina v. United States*, 199 U. S. 437, 451-452; *Helvering v. Gerhardt*, 304 U. S. 405, 412-415. And when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments. See *McCulloch v. Maryland*, *supra*, 421-422; *Smith v. Kansas City Title Co.*, 255 U. S. 180, 208; *Federal Land Bank v. Crosland*, 261 U. S. 374; *New York ex rel. Rogers v. Graves*, *supra*.

The single question with which we are now concerned is whether the tax laid by the state upon the salary of respondent, employed by a corporate instrumentality of the federal government, imposes an unconstitutional burden upon that government. The theory of the tax immunity of either government, state or national, and its instrumentalities, from taxation by the other, has been rested upon an implied limitation on the taxing power of each, such as to forestall undue interference, through the exercise of that power, with the governmental activities of the other. That the two types of immunity may not, in all respects, stand on a parity has been recognized from the beginning, *McCulloch v. Maryland*, *supra*, 435-436, and possible differences in application, deriving from differences in the source, nature and extent of the immunity of the governments and their agencies, were pointed out and discussed by this Court in detail during the last term. *Helvering v. Gerhardt*, *supra*, 412-413, 416.

So far as now relevant, those differences have been thought to be traceable to the fact that the federal government is one of delegated powers in the exercise of which Congress is supreme; so that every agency which Congress can constitutionally create is a governmental agency. And since the power to create the agency includes the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect the agency, there has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of federal agencies from state taxation. See *Van Allen v. The Assessors*, 3 Wall. 573, 583, 585; *Bank v. Supervisors*, 7 Wall. 26, 30, 31; *Thomson v. Pacific Railroad*, 9 Wall. 579, 588, 590; *People v. Weaver*, 100 U. S. 539, 543; *Mercantile Bank v. New York*, 121 U. S. 138, 154; *Owensboro National Bank v. Owensboro*, 173 U. S. 664, 668; *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U. S. 575, 581; *Oklahoma v. Barnsdall Corp.*, 296 U. S. 521, 525-526; *Baltimore National Bank v. State Tax Comm'n*, 297 U. S. 209, 211-212; *British-American Company v. Board*, 299 U. S. 159; *James v. Dravo Contracting Co.*, 302 U. S. 134, 161; *Helvering v. Gerhardt*, *supra*, 411, 412, 417; cf. *United States v. Bekins*, 304 U. S. 27, 52. Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of federal agencies which courts have implied, is a question which need not now be determined.

Congress has declared in § 4 of the Act that the Home Owners' Loan Corporation is an instrumentality of the United States and that its bonds are exempt, as to principal and interest, from federal and state taxation, except surtaxes, estate, inheritance and gift taxes. The corporation itself, "including its franchise, its capital, reserves and surplus, and its loans and income," is likewise exempted from taxation; its real property is subject to tax to the same extent as other real property. But Congress has given no intimation of any purpose either to grant or withhold immunity from state taxation of the salary of the corporation's employees, and the Congressional intention is not to be gathered from the statute by implication. Cf. *Baltimore National Bank v. State Tax Comm'n*, *supra*.

It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implication depend upon the nature of the Congressional power and the effect of its exercise.¹ But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has

¹ The failure of Congress to regulate interstate commerce has generally been taken to signify a Congressional purpose to leave undisturbed the authority of the states to make regulations affecting the commerce in matters of peculiarly local concern, but to withhold from them authority to make regulations affecting those phases of it which, because of the need of a national uniformity, demand that their regulation, if any, be prescribed by a single authority. *Cooley v. Board of Wardens*, 12 How. 299, 319; *Minnesota Rate Cases*, 230 U. S. 352, 399-400; *Kelly v. Washington*, 302 U. S. 1, 14; *South Carolina State Highway Dept. v. Barnwell Brothers*, 303 U. S. 177, 184-185; *Milk Control Board v. Eisenberg Farm Products*, decided February 27, 1939. As to the implications from Congressional silence in the field of state taxation of interstate commerce and its instrumentalities, see *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250; *Gwin, White & Prince, Inc. v. Henneford*, decided January 3, 1939.

disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.

The present tax is a non-discriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. It is ~~laid upon~~ income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 313, 314; *Hale v. State Board*, 302 U. S. 95, 108; *Helvering v. Gerhardt*, *supra*; cf. *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *Fox Film Corp. v. Doyal*, 286 U. S. 123; *James v. Dravo Contracting Co.*, *supra*, 149; *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, and the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions.

In the four cases in which this Court has held that the salary of an officer or employee of one government or its instrumentality was immune from taxation by the other, it was assumed, without discussion, that the immunity of a government or its instrumentality extends to the salaries of its officers and employees.² This assumption, made with respect to the salary of a governmental offi-

² In *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, a Pennsylvania tax, nominally laid upon the office of the captain of a federal revenue cutter, but roughly measured by the salary paid to the officer, was held invalid. The Court seems to have rested its decision in part on the ground that a tax on the emoluments of his office was the equivalent of a tax upon an activity of the national government, and in part on the ground that it was an infringement of the implied superior power of Congress to fix the compensation of government employees without diminution by state taxation.

In *Collector v. Day*, 11 Wall. 113, this Court held that the salary of a state probate judge was constitutionally immune from federal income tax on the

measured by

cer in *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, and in *Collector v. Day*, 11 Wall. 113, was later extended to confer immunity on income derived by a lessee from lands leased to him by a government in the performance of a governmental function, *Gillespie v. Oklahoma*, 257 U. S. 501; *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, and cases cited, although the claim of a like exemption from tax on the income of a contractor engaged in carrying out a government project was rejected both in the case of a contractor with a state, *Metcalf & Eddy v. Mitchell*, *supra*, and of a contractor with the national government, *James v. Dravo Contracting Co.*, *supra*.

The ultimate repudiation in *Helvering v. Mountain Producers Corp.*, *supra*, of the doctrine that a tax on the income of a lessee derived from a lease of government owned or controlled lands is a forbidden interference with the activities of the government concerned led to the re-examination by this Court, in the *Gerhardt* case, of the theory underlying the asserted immunity from taxation by one government of salaries of employees of the other. It was

grounds that the salary of an officer of a state is exempt from federal taxation if the function he performs as an officer is exempt, citing *Dobbins v. Commissioner of Erie County*, *supra*, and that there was an implied constitutional restriction upon the power of the national government to tax a state in the exercise of those functions which were essential to the maintenance of state governments as they were organized at the time when the Constitution was adopted. The possibility that a non-discriminatory tax upon the income of a state officer did not involve any substantial interference with the functioning of the state government was not discussed either in this or the *Dobbins* case.

In *New York ex rel. Rogers v. Graves*, 299 U. S. 401, the question was whether the salary of the general counsel of the Panama Rail Road Company was exempt from state income tax because the railroad company was an instrumentality of the federal government. The sole question raised by the taxing state was whether the railroad company was a government instrumentality. The Court, having found that the railroad company was such an instrumentality, disposed of the matter of tax exemption of the salary of its employees by declaring: "The railroad company being immune from state taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune." *New York ex rel. Rogers v. Graves*, *supra*, 408.

In *Brush v. Commissioner*, 300 U. S. 352, the applicable treasury regulation upon which the government relied exempted from federal income tax the compensation of "state officers and employees" for "services rendered in connection with the exercise of an essential governmental function of the State." The Court held that the maintenance of the public water system of New York City was an essential governmental function, and in determining whether the salary of the engineer in charge of that project was subject to federal income tax the Court declared, citing *New York ex rel. Rogers v. Graves*, *supra*, 408: "The answer depends upon whether the water system of the city was created and is conducted in the exercise of the city's governmental functions. If so, its operations are immune from federal taxation and, as a necessary corollary, 'fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune.'" *Brush v. Commissioner*, *supra*, 360.

there pointed out that the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed. See *Metcalf & Eddy v. Mitchell*, *supra*, 523-524; *James v. Dravo Contracting Co.*, *supra*, 156-158. It was further pointed out that, as applied to the taxation of salaries of the employees of one government, the purpose of the immunity was not to confer benefits on the employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy, or to give an advantage to that government by enabling it to engage employees at salaries lower than those paid for like services by other employers, public or private,³ but to prevent undue interference with the one government by imposing on it the tax burdens of the other.

In applying these controlling principles in the *Gerhardt* case the Court held that the salaries of employees of the New York Port Authority, a state instrumentality created by New York and New Jersey, were not immune from federal income tax, even though the Authority be regarded as not subject to federal taxation. It was said that the taxpayers enjoyed the benefit and protection of the laws of the United States and were under a duty, common to all citizens, to contribute financial support to the government; that the tax laid on their salaries and paid by them could be said to affect or burden their employer, the Port Authority, or the states creating it, only so far as the burden of the tax was economically passed on to the employer; that a non-discriminatory tax laid on the income of all members of the community could not be assumed to obstruct the function which New York and New Jersey had undertaken to perform, or to cast an economic burden upon them, more than does the general taxation of

³ The fact that the expenses of the one government might be lessened if all those who deal with it were exempt from taxation by the other was thought not to be an adequate basis for tax immunity in *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *Group No. 1 Oil Corp. v. Bass*, 283 U. S. 279; *Burnet v. Jergins Trust*, 288 U. S. 508; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Helvering v. Mountain Producers Corp.*, 303 U. S. 376.

property and income which, to some extent, incapable of measurement by economists, may tend to raise the price level of labor and materials.⁴ The Court concluded that the claimed immunity would do no more than relieve the taxpayers from the duty of financial support to the national government in order to secure to the state a theoretical advantage, speculative in character and measurement and too unsubstantial to form the basis of an implied constitutional immunity from taxation.

The conclusion reached in the *Gerhardt* case that in terms of constitutional tax immunity a federal income tax on the salary of an employee is not a prohibited burden on the employer makes it imperative that we should consider anew the immunity here claimed for the salary of an employee of a federal instrumentality. As already indicated, such differences as there may be between the implied tax immunity of a state and the corresponding immunity of the national government and its instrumentalities may be traced to the fact that the national government is one of delegated powers, in the exercise of which it is supreme. Whatever scope this may give to the national government to claim immunity from state taxation of all instrumentalities which it may constitutionally create, and whatever authority Congress may possess as incidental to the exercise of its delegated powers to grant or withhold immunity from state taxation, Congress has not sought in this case to exercise such power. Hence these distinctions between the two types of immunity cannot affect the question with which we are now concerned. The burden on government of a non-discriminatory income tax applied to the salary of the employee of a government or its instrumentality is the same, whether a state or national government is concerned. The determination in the *Gerhardt* case that the federal income tax imposed on the employees of the Port Authority was not a burden on the Port Authority made it unnecessary to consider

⁴ That the economic burden of a tax on salaries is passed on to the employer or that employees will accept a lower government salary because of its tax immunity, are formulas which have not won acceptance by economists and cannot be judicially assumed. As to the "passing on" of the economic burden of the tax, see Seligman, *Income Tax*, VII *Encyclopedia of Social Sciences*, 626-638; Pichn, *Public Finance* (5th Ed.), p. 320; Buehler, *Public Finance*, p. 240; Lutz, *Public Finance* (2d Ed.), p. 336, and see *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 581, footnote 1. As to preference for government employment because the salary is tax exempt, see Dickinson, *Compensating Industrial Effort* (1937), pp. 7-8; Douglas, *The Reality of Non-Commercial Incentives in Industrial Life*, c. V of *The Trend of Economics* (1924); Vol. I, Fetter, *Economic Principles* (1915), p. 203.

whether the Authority itself was immune from federal taxation; the claimed immunity failed because even if the Port Authority were itself immune from federal income tax, the tax upon the income of its employees cast upon it no unconstitutional burden.

Assuming, as we do, that the Home Owners' Loan Corporation is clothed with the same immunity from state taxation as the government itself, we cannot say that the present tax on the income of its employees lays any unconstitutional burden upon it. All the reasons for refusing to imply a constitutional prohibition of federal income taxation of salaries of state employees, stated at length in the *Gerhardt* case, are of equal force when immunity is claimed from state income tax on salaries paid by the national government or its agencies. In this respect we perceive no basis for a difference in result whether the taxed income be salary or some other form of compensation, or whether the taxpayer be an employee or an officer of either a state or the national government, or of its instrumentalities. In no case is there basis for the assumption that any such tangible or certain economic burden is imposed on the government concerned as would justify a court's declaring that the taxpayer is clothed with the implied constitutional tax immunity of the government by which he is employed. That assumption, made in *Collector v. Day*, *supra*, and in *New York ex rel. Rogers v. Graves*, *supra*, is contrary to the reasoning and to the conclusions reached in the *Gerhardt* case and in *Metcalf & Eddy v. Mitchell*, *supra*; *Group No. 1 Oil Corporation v. Bass*, 283 U. S. 279; *Jones v. Dravo Contracting Co.*, *supra*; *Helvering v. Mountain Producers Co. p.*, *supra*; *McLoughlin v. Commissioner*, 303 U. S. 218. In their light the assumption can no longer be made. *Collector v. Day*, *supra*, and *New York ex rel. Rogers v. Graves*, *supra*, are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities.

So much of the burden of a non-discriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and

hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments.

Reversed.

Mr. Chief Justice HUGHES concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 478.—OCTOBER TERM, 1938.

Mark Graves, John J. Merrill and
John P. Hennessy, as Commissioners
Constituting the State Tax Commis-
sion of the State of New York, Pe-
titioners,

vs.

The People of the State of New York,
Upon the Relation of James B.
O'Keefe.

On Writ of Certiorari to
the Supreme Court of
the State of New York.

[March 27, 1939.]

Mr. Justice FRANKFURTER, concurring.

I join in the Court's opinion but deem it appropriate to add a few remarks. The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions.¹ But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court. Such shifts of opinion should not derive from mere private judgment. They must be duly mindful of the necessary demands of continuity in civilized society. A reversal of a long current of decisions can be justified only if rooted in the Constitution itself as an historic document designed for a developing nation.

For one hundred and twenty years this Court has been concerned with claims of immunity from taxes imposed by one authority in our dual system of government because of the taxpayer's relation to the other. The basis for the Court's intervention in this field has not been any explicit provision of the Constitution. The States, after they formed the Union, continued to have the same range of taxing power which they had before, barring only duties affecting

¹ The state of the docket of the High Court of Australia and that of the Supreme Court of Canada still permits them to continue the classic practice of *seriatim* opinions.

exports, imports, and on tonnage.² Congress, on the other hand, to lay taxes in order "to pay the Debts and provide for the common Defense and general Welfare of the United States", Art. I, Sec. 8, can reach every person and every dollar in the land with due regard to Constitutional limitations as to the method of laying taxes. But, as is true of other great activities of the state and national governments, the fact that we are a federalism raises problems regarding these vital powers of taxation. Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government.

The arguments upon which *McCulloch v. Maryland*, 4 Wheat. 316, rested had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in *McCulloch v. Maryland*. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that "the power to tax involves the power to destroy." *Id.*, at p. 431. This dictum was treated as though it were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the States and the Union within their respective orbits resulting from a doctrinaire application of the generalities uttered in the course of the opinion in *McCulloch v. Maryland*.³ The seductive cliché that the power to tax involves the power to destroy was fused with another assumption, likewise not to be found in the Constitution itself, namely the doctrine that the immunities are correlative—because the existence of the national government implies immunities from state taxation, the existence of state governments implies equivalent immunities from federal taxation. When this doctrine was first

² Article 1, Sec. 10, U. S. Constitution.

³ *Weston v. City Council of Charleston*, 2 Pet. 449, 472-73.

applied Mr. Justice Bradley registered a powerful dissent,⁴ the force of which gathered rather than lost strength with time. *Collector v. Day*, 11 Wall. 113, 128.

All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called "pernicious abstractions". The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes's pen: "The power to tax is not the power to destroy while this Court sits". *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 223 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism,⁵ and this, too, when the financial needs of all governments began steadily to mount. These decisions have encountered increasing dissent.⁶ In view of the powerful pull of our decisions upon the courts charged with maintaining the constitutional equilibrium of the two other great English federalisms, the Canadian and the Australian courts were at first inclined to follow the earlier doctrines of this Court regarding intergovernmental immunity.⁷ Both the Supreme Court of Canada and the High Court of Australia on fuller consideration—and for present purposes the British North America

⁴ "I dissent from the opinion of the court in this case, because, it seems to me that the general government has the same power of taxing the income of officers of the State governments as it has of taxing that of its own officers. . . . In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult of control. Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? . . . How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences." (11 Wall. 113, 128-29.)

⁵ *E.g.*, *Gillespie v. Oklahoma*, 257 U. S. 501; *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218; *Macallen Co. v. Massachusetts*, 279 U. S. 620; *Indian Motorcycle Co. v. United States*, 283 U. S. 570; *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393; *N. Y. ex rel. Rogers v. Graves*, 299 U. S. 401; *Brush v. Commissioner of Internal Revenue*, 300 U. S. 352.

⁶ *E.g.*, Mr. Justice Brandeis, dissenting, in *Jaybird Mining Co. v. Weir*, 271 U. S. 609, 615; Justice Holmes, dissenting, in *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 222; Mr. Justice Stone, dissenting, in *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 560; Mr. Justice Roberts, dissenting, in *Brush v. Commissioner of Internal Revenue*, 300 U. S. 352, 374. See, also, Mr. Justice Black, concurring, in *Helvering v. Gerhardt*, 304 U. S. 405, 424.

⁷ *Bank of Toronto v. Lambe*, 12 App. Cas. 575; *D'Emden v. Pedder*, 1 C. L. R. 91.

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Act, 30 & 31 Viet., c. 3, and the Commonwealth of Australia Constitution Act, 63 & 64 Viet., c. 12, raise the same legal issues as does our Constitution⁸—have completely rejected the doctrine of intergovernmental immunity.⁹ In this Court dissents have gradually become majority opinions, and even before the present decision the rationale of the doctrine had been undermined.¹⁰

The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution. Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.¹¹ Neither *Dobbins v. Commissioners*, 16 Pet. 435, and its offspring, nor *Collector v. Day*, *supra*, and its, can stand appeal to the Constitution and its historic purposes. Since both are the starting points of an interdependent doctrine, both should be, as I assume them to be, overruled this day. Whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits of the State governments under which they live is matter for another day.

⁸ Especially is this true of the Australian Constitution. One of its framers, who afterwards became one of the most distinguished of Australian judges, Mr. Justice Higgins, characterized it as having followed our Constitution with "pedantic imitation." *Australasian Temperance and General Mutual Life Assurance Co., Ltd., v. Howe*, 31 C. L. R. 290, 330.

⁹ *Abbott v. City of St. John*, 40 Can. Sup. Ct. 597; *Caron v. The King*, (1924) A. C. 999; *Amalgamated Society of Engineers v. Adelaide Steamship Co., Ltd.*, 28 C. L. R. 129; *West v. Commissioner of Taxation*, 56 C. L. R. 657.

¹⁰ *E.g.*, *James v. Dravo Contracting Co.*, 302 U. S. 134; *Helvering v. Mountain Producers Corp.*, 303 U. S. 376; *Helvering v. Gerhardt*, 304 U. S. 405.

¹¹ Compare Taney, C. J., in *Passenger Cases*, 7 How. 283, 470: "I . . . am quite willing that it be regarded as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."

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On Writ of Certiorari to
the Supreme Court of
the State of New York.

[March 27, 1939.]

Mr. Justice BUTLER, dissenting.

Mr. Justice McREYNOLDS and I are of opinion that the Home Owners' Loan Corporation, being an instrumentality of the United States heretofore deemed immune from state taxation, "it necessarily results," as held in *New York ex rel. Rogers v. Graves* (1937) 299 U. S. 401, "that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune"; and that the judgment of the state court, unquestionably required by that decision, should be affirmed.

From the decision just announced, it is clear that the Court has overruled *Dobbins v. The Commissioners of Erie County* (1842) 16 Pet. 435, *Collector v. Day* (1871) 11 Wall. 113, *New York ex rel. Rogers v. Graves, supra*, and *Brush v. Commissioner* (1937) 300 U. S. 352. Thus now it appears that the United States has always had power to tax salaries of state officers and employees and that similarly free have been the States to tax salaries of officers and employees of the United States. The compensation for past as well as for future service to be taxed and the rates prescribed in the exertion of the newly disclosed power depend on legislative discretion not subject to judicial revision. Futile indeed are the vague intimations that this Court may protect against excessive or destructive taxation. Where the power to tax exists, legislatures may

exert it to destroy, to discourage, to protect or exclusively for the purpose of raising revenue. See e.g. *Veazie Bank v. Fenno*, 8 Wall. 533, 548; *McCray v. United States*, 195 U. S. 27, 53 *et seq.*; *Magnano Co. v. Hamilton*, 292 U. S. 40, 44 *et seq.*; *Cincinnati Soap Co. v. United States*, 301 U. S. 308.

Appraisal of lurking or apparent implications of the Court's opinion can serve no useful end for, should occasion arise, they may be ignored or given direction differing from that at first seemingly intended. But safely it may be said that presently marked for destruction is the doctrine of reciprocal immunity that by recent decisions here has been so much impaired.